

MOEZ M. KABA

mkaba@hueston.com

523 West 6<sup>th</sup> Street

D: 213 788 4543

Suite 400

T: 213 788 4340

Los Angeles, CA 90014

F: 888 775 0898

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## HUESTON HENNIGAN LLP

Wednesday, November 20, 2019

### SUBMITTED THROUGH ECF

Honorable Shashi H. Kewalramani  
George E. Brown, Jr. Federal Building and United States Courthouse  
3470 12th Street  
Riverside, CA 92501

**Re: *Monster Energy Co. v. Vital Pharm., Inc.*, Case No. 5:18-cv-1882-JGB-SHK (C.D. Cal.)**

Dear Honorable Shashi H. Kewalramani:

Plaintiff Monster Energy Company (“Monster”) submits the below letter brief in support of its request for Defendant Vital Pharmaceuticals, Inc. (“VPX”) to further supplement its responses to Interrogatories 4, 7, and 8.

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### A. Introduction

An important component of Monster's false advertising case against VPX is its allegation that VPX's promotion of the "Super Creatine" in BANG energy drinks is deceptive. (ECF No. 61 ¶¶ 42-59.) Monster's position on "Super Creatine" has been clear for months: Super Creatine "is functionally useless," "does not release creatine," and "offers no health benefits to consumers." (*Id.* at 15 & ¶ 53.)

In June and July 2019, Monster served three interrogatories to determine, and understand the basis for, VPX's position on the purported benefits of Super Creatine:

- **Interrogatory No. 4:** "If YOU contend that the 'Super Creatine' in BANG creates positive health effects for drinkers, identify all publications, research papers, and DOCUMENTS supporting YOUR claim, and how that source supports YOUR claim that the 'Super Creatine' in BANG creates positive health effects for drinkers."
- **Interrogatory No. 7:** "If YOU contend that the Super Creatine contained in BANG has an effect on the VITALS and SUBSTANCES<sup>1</sup> in the human body, identify all such effects and all DOCUMENTS that support YOUR contention."
- **Interrogatory No. 8:** "If YOU contend that the Super Creatine contained in BANG increases the circulating levels of creatine or creatinine in the human body, identify all bases supporting YOUR contention, including the approximate amount of the alleged increases."

(See Ex. 1 at 4; Ex. 2 at 3-4.) These interrogatories ask VPX to clearly state whether, *in this litigation*, they contend that Super Creatine (i) creates positive health effects, (ii) has an effect on vitals and substances in the human body, and (iii) increases the circulating level of creatine or creatinine in the human body. If VPX is not making these contentions, these Interrogatories require VPX to make only a short and simple statement saying "VPX is not making this contention."

VPX served its responses in July and August 2019. Monster then met-and-conferred with VPX on multiple occasions to see if VPX would supplement its responses to provide the requested information. (See Exs. 3, 4.) Monster agreed to provide VPX

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<sup>1</sup> "VITALS" is defined to "include body temperature, blood pressure, heart rate and respiratory rate." (Ex. 2 at 3.) "SUBSTANCES" is defined as "all substances naturally produced by the human body, including creatine and creatinine." (*Id.*)

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five separate extensions for VPX to supplement its responses.<sup>2</sup> VPX provided its final supplemental responses on October 30, 2019. (See Ex. 5 at 15, 27, 35)

Despite these extensions and supplementation, VPX still has not clearly answered whether VPX is making any of these three contentions and, if so, VPX's factual basis for making these contentions. Instead, VPX's lengthy objections and evasive responses include confusing and irrelevant information and state that VPX is "**explicitly reserv[ing] the right to make [these] contention[s] in this case in the future.**" (Ex. 5 at 29, 37 (emphasis added).) Monster still does not know whether VPX intends to make these contentions in this lawsuit, even though it is plainly entitled to this information.

Thus, Monster has been forced to bring this motion to compel. For the reasons discussed below, this Court should compel VPX to provide clear and concise answers to the questions asked by these interrogatories.

### B. Monster's Interrogatories Seek Relevant Information

"Relevance" for purposes of discovery "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Nguyen v. Lotus by Johnny Dung Inc.*, 2019 WL 3064479, at \*1 (C.D. Cal. June 5, 2019).

Monster's interrogatories easily satisfy this standard. By seeking VPX's position on the effects of Super Creatine in the human body, these interrogatories directly relate to the allegations in Monster's complaint and the issues framed by Judge Bernal's prior orders. (See Order Denying Motion to Dismiss, ECF No. 95 at 14 (holding that Monster had stated a false advertising claim by alleging that "Super Creatine is unlike creatine in that it has no health benefits"); Order Denying Motion for Preliminary Injunction, ECF No.

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<sup>2</sup> See Ex. 4 at 6 ("Please let us know **by Tuesday, October 1 by 5pm PT** if VPX intends to supplement its answers to Interrogatories 4, 7, and 8 to answer the queries posed by those interrogatories."); *id.* at 5 ("[I]t has now been 13 days since Monster served its LR 37-1 letter. Please provide us with VPX's final position by **4pm PT this Friday, October 4** so that we can either settle this discovery dispute or bring it to the attention of the Court."); *id.* at 4 ("If you cannot send us a final answer by **Monday, October 7 at 5pm PT**, we will e-mail Judge Kewalramani and offer Tuesday, Thursday, and Friday as the parties' availability for a telephonic conference."); *id.* at 3 ("I hope that taking this extra time is in furtherance of a genuine desire to meet and confer to resolve our disputes and not simply a delay tactic. We look forward to your final response by this **Friday, 10/11, at 4pm PT**."); *id.* (VPX on October 11 stating: "VPX is working on a response to supplement those 4 interrogatories and anticipates serving it on Monster within 2 weeks, by October 25."); *id.* at 2 (VPX on October 25 stating: "In connection with those objections and likely supplementation of that interrogatory, we are still working on the supplemental responses to other interrogatories (4, 6, 7, 8) and will do so on [October 30].") (emphasis added).

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122 at 6 (“[I]n order to prevail, Monster must demonstrate that Super Creatine does not provide the benefits of creatine.”).)

And as this Court has recognized, Monster’s allegations about Super Creatine bear on at least three of Monster’s causes of action: “the Lanham Act false advertising claim, the unfair competition claim, and the false advertising claim.” (ECF No. 136 at 7.)

Because Monster’s requests are relevant, the burden shifts to VPX to show that it properly resisted discovery. *McGraw-Hill Companies, Inc.*, 2014 WL 1647385, at \*8; *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (“The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.”). As set forth below, VPX cannot meet this burden.

### C. VPX Has Failed to Provide Clear and Concise Answers to the Questions Asked

Parties “have a duty to provide true, explicit, responsive, complete and candid answers to interrogatories.” *United States ex rel. Brown v. Celgene Corp.*, 2015 WL 12731923, at \*4 (C.D. Cal. July 24, 2015). Said another way, “answers to interrogatories must be responsive, full, complete and unequivocal.” *In re Rivera*, 2017 WL 5163695, at \*2 (C.D. Cal. Apr. 14, 2017).

The opinion in *Lincoln Benefit Life Co. v. Fundament*, 2018 WL 7051064, at \*3 (C.D. Cal. Dec. 6, 2018), illustrates this rule and is on point. In that case (a life insurance dispute), the claimant posed several interrogatories “prefaced by the phrase ‘if YOU contend that PAULO is not dead.’” *Id.* To each interrogatory, the insurance company answered “not applicable.” *Id.* The court held that such responses were deficient because they “did not answer the question asked: does [the insurance company] contend that Paulo is not dead.” *Id.* As here, the propounding party “has a right to an answer to that question, and to the facts supporting such contention if [the responding party] so contends, in order to fairly prepare for trial.” *Id.*

Just as in *Lincoln Benefit*, VPX has not satisfied its obligation to provide clear and precise answers. In response to each of Monster’s straightforward interrogatories, VPX provided **8 pages** of irrelevant information. For example, responding to Monster’s request for VPX’s position on whether Super Creatine “increases the circulating levels of creatine or creatinine in the human body,” VPX stated, among other things, that:

- “VPX’s BANG product is so successful that Monster introduced a nearly identical product called REIGN.” (Ex. 5 at 40.)

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- “BANG is infinitely safer and healthier than Monster.” (*Id.* at 43.)
- BANG is “a great tasting drink.” (*Id.* at 41.)
- “Monster has the burden of proving all elements of each cause of action. Monster has not done so.” (*Id.* at 39.)

These statements—and many others like them—have nothing to do with the interrogatories Monster posed to VPX.

While packing its answer with irrelevant information, VPX also fails to answer the questions posed to it. Monster sought to identify VPX’s positions in this litigation by asking a series of “if you contend” interrogatories.” (Ex. 1 at 3-4; Ex. 2 at 3-4.) But VPX’s responses don’t even answer the threshold question imbedded in each interrogatory: whether VPX is or is not making these contentions in the first place.

In fact, VPX not only fails to answer this inquiry, but “explicitly” refuses to do so. In its responses, VPX states: “While Responding Party is not aware of any previous contention that Responding Party has made in this litigation . . . , **Responding Party explicitly reserves the right to make that contention in this case in the future.**” (See Ex. 5. at 29, 37 (emphasis added).)

VPX’s equivocation is inappropriate. Monster is entitled to plain responses to the questions it actually asked VPX. *Lincoln Benefit*, 2018 WL 7051064, at \*3–4 (ordering party to serve verified, supplemental responses without objection where the plaintiff provided “an answer to the question asked” and “the facts supporting such contention if Plaintiff so contends”).

VPX may argue that it has adequately answered Monster’s interrogatories by disclosing that it has not *previously* made the contentions at issue. In its responses, VPX notes, for example, that it “is not aware of any *previous* contention.” (Ex. 5 at 29 (emphasis added).) VPX likewise responds that it “is not aware of any contentions VPX *has made* in this case or publicly.” (*Id.* at 21, 34, 42 (emphases added).) And during both the pre-motion conference and the meet-and-confer process, VPX argued that it would respond to Monster’s interrogatories only if Monster “point[ed] [VPX] to the specific contentions so VPX can review.” (Ex. 4 at 1; *id.* (“Monster has not provided any information for where VPX has made those contentions.”).)

VPX misunderstands the proper scope of contention interrogatories. “It is proper for a party to propound contention interrogatories seeking identification of the opposing party’s positions and the evidence in support of those positions.” *Bos. v. ClubCorp USA, Inc.*, 2019 WL 1873293, at \*8 (C.D. Cal. Mar. 11, 2019). Interrogatories can properly be

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used “to require one’s opponent to state its position on an issue in controversy in writing and under oath.” *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 281 F.R.D. 1, 3 (D.D.C. 2011). Such contention interrogatories serve the basic purpose of discovery: to make a trial “less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible.” *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958).

Monster therefore has the right to learn not only whether VPX has made a statement *in the past*, but also whether VPX is presently making a contention *in this litigation*, and if so, what are the facts supporting the contention. Monster seeks to learn—and has a right to learn—whether VPX is taking these positions as a defense to Monster’s claims. See *Rivera*, 2017 WL 5163695, at \*2 (“The purpose of interrogatories is to limit and clarify the issues for the parties in preparation for further trial proceedings.”).<sup>3</sup>

### D. Monster is Not Seeking “Premature” Expert Testimony

VPX objects to Monster interrogatories “as seeking information that calls for expert opinion or a legal conclusion.” (Ex. 5 at 28, 36.) VPX believes that “[t]o the extent information will be analyzed by an expert, such information may be provided in an expert report.” (*Id.* at 36.)

VPX is again wrong on the law. The mere fact that information will be provided to an expert does not shield it from discovery. Courts have repeatedly held that “[n]on-privileged facts known to” a party “are not immune from discovery simply because they will ultimately become part of an expert’s opinion.” *Montgomery v. Wal-Mart Stores, Inc.*, 2015 WL 11233384, at \*4 (S.D. Cal. July 17, 2015); *Sony Corp. v. Vizio, Inc.*, 2009 WL 10675358, at \*1 (C.D. Cal. Oct. 23, 2009) (rejecting party’s argument that interrogatory on damages is solely “the subject of expert opinion” and ordering the party to “respond fully and completely to all discovery requests to the best of their knowledge, based on the information they have to date”). Indeed, courts have awarded sanctions for parties who withheld factual information in their possession “until the exchange of expert reports.” *California v. Kinder Morgan Energy Partners, LP*, 613 F. App’x 561, 563 (9th Cir. 2015) (affirming sanctions).

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<sup>3</sup> In any event, even if VPX had a responsibility to identify only *past* statements and provide sources for those statements, VPX’s responses would still be deficient. In response to each of the interrogatories at issue, VPX claims that it “is not aware” of having made the statement, “**except as compared to other energy drinks offered by competitors.**” (Ex. 5 at 21, 34, 42 (emphasis added).) VPX’s qualification of its answer is material. If VPX is aware of having made these contentions about “competitors”—presumably including Monster—it should at minimum disclose these contentions and the bases for the same.

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Thus, VPX must provide Monster its best answer based on its current knowledge. It would be surprising if VPX—which calls itself a “pharmaceuticals” company;<sup>4</sup> claims to have conducted an “unprecedent 27 Double-Blind Placebo Controlled Gold Standard University Human Test Subject Studies”; and purports to be led by “the world’s leading authority, author, and developer of performance enhancing supplementation” (ECF No. 61 ¶¶ 25, 33, 37)—knew so little about the ingredient it allegedly invented, patented, and now advertises so heavily. But, if so, that too is a significant fact to which Monster is entitled.

\* \* \*

Monster’s interrogatories seek relevant information from VPX. VPX’s responses are deficient and VPX lacks any valid objection for failing to provide complete and concise answers. The Court should therefore compel VPX to comply with its discovery obligations and to supplement its responses to provide clear and concise responses to Monster’s interrogatories. Specifically, VPX should be ordered to either say that does not contend—and will not contend in this litigation—that Super Creatine (1) creates positive health effects for drinkers; (2) has an effect on the VITALS and SUBSTANCES in the human body; and (3) increases the circulating levels of creatine or creatinine in the human body; or that VPX does contend that Super Creatine has those effects and provide the facts supporting that contention.

Sincerely,



Moez Kaba

Attachments

cc: Counsel of Record

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<sup>4</sup> “In Owoc’s words, ‘the acronym VP(x) actually stands for Vital Pharmaceuticals with the X appearing lower than VP similar to how it appears in RX.’” (ECF No. 61 ¶ 25.)

# EXHIBIT 1

1 John C. Hueston, State Bar No. 164921  
jueston@hueston.com  
2 Moez M. Kaba, State Bar No. 257456  
mkaba@hueston.com  
3 Steven N. Feldman, State Bar No. 281405  
sfeldman@hueston.com  
4 HUESTON HENNIGAN LLP  
523 West 6th Street, Suite 400  
5 Los Angeles, CA 90014  
Telephone: (213) 788-4340  
6 Facsimile: (888) 775-0898

7 Attorneys for Defendant  
MONSTER ENERGY COMPANY, a Delaware  
8 corporation

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

2 MONSTER ENERGY COMPANY, a  
Delaware corporation,

Plaintiff,

VS.

VITAL PHARMACEUTICALS, INC.,  
d/b/a VPX Sports, a Florida corporation;  
and JOHN H. OWOC a.k.a. JACK  
OWOC, an individual.

#### Defendants.

Case No. 5:18-cv-1882-JGB-SHK

**PLAINTIFF MONSTER ENERGY  
COMPANY'S FIRST SET OF  
SPECIAL INTERROGATORIES TO  
DEFENDANT VITAL  
PHARMACEUTICALS, INC.**

PROPOUNDING PARTY: Plaintiff Monster Energy Company

RESPONDING PARTY: Defendant Vital Pharmaceuticals, Inc.

SET NO.: One

**PLEASE TAKE NOTICE** that Plaintiff Monster Energy Company hereby requests that Defendant Vital Pharmaceuticals Inc. d/b/a VPX Sports answer, in writing, the following First Set of Interrogatories within thirty (30) days after service hereof pursuant to Federal Rule of Civil Procedure 33, *et seq.*

## **DEFINITIONS AND INSTRUCTIONS**

6       1. The terms “and” and “or” shall be construed conjunctively or  
7 disjunctively as necessary to make the Requests inclusive rather than exclusive; the  
8 singular shall include the plural and the plural shall include the singular; the use of a  
9 verb in any tense shall be construed as the use of the verb in all other tenses  
10 whenever necessary to bring within the scope of the Requests any response that  
11 might otherwise be construed outside their scope.

12        2. The terms “reflecting,” “referring,” or “relating to,” or any part thereof,  
13 in addition to their customary and usual meaning, mean and refer to discussing,  
14 constituting, mentioning, pertaining to, assessing, embodying, recording, stating,  
15 concerning, constituting, mentioning, pertaining to, assessing, embodying, recording,  
16 stating, concerning, describing touching upon, or summarizing.

17       3. The term “BANG” refers to the Bang Energy line of energy drink  
18 products.

19       4. The term "DOCUMENT(S)" includes all written and graphic matter,  
20 however produced or reproduced, of any kind or description, whether sent or  
21 received or neither, including originals, non-identical copies, and drafts, and both  
22 sides thereof, including but not limited to: letters, correspondence, papers,  
23 memoranda, contracts, agreements, books, journals, ledgers, statements, reports,  
24 studies, billings, invoices, worksheets, jottings, projections, notes, abstracts,  
25 advertisements, drawings, audits, charges, balance sheets, income statements, checks,  
26 diagrams, diaries, calendar logs, recordings, instructions, lists, minutes of meetings,  
27 orders, resolutions, audio or visual images, facsimile transmissions, telegrams, wires,  
28 cables, telexes, electronic mail, messages, text messages, chat messages sent via any

1 online messaging service (including, without limitation, WeChat, WhatsApp, Signal,  
2 Facebook Messenger, Instagram, Hangouts, Google chat, and Skype), comments and  
3 posts (whether text, photo, video, or otherwise) on SOCIAL MEDIA applications  
4 (including, without limitation, Facebook, Instagram, and Twitter), resumes,  
5 summaries, tabulations, tallies, statistical analyses, tapes, computer files stored by  
6 any electronic means (including, without limitation, on cloud-based storage  
7 platforms such as Dropbox, Google Drive, iCloud, OneDrive, and SharePoint),  
8 computer printouts, and all other informal or formal writing or tangible things on  
9 which any handwriting, typing, printing, video or sound is recorded or reproduced,  
10 and any and all amendments or supplements to all of the foregoing, whether prepared  
11 by a party or another PERSON.

12       5.     The term “MONSTER” refers to Plaintiff Monster Energy Company.

13       6.     The term “YOU” or “YOUR” refers to VPX, as well as its agents and  
14 representatives.

15       7.     The term “VPX” refers to Vital Pharmaceuticals, Inc. d/b/a VPX Sports,  
16 as well as its agents and representatives.

### **REQUEST FOR INTERROGATORIES**

#### **INTERROGATORY NO. 1**

19       State the formula for YOUR BANG energy drink, including the amount used  
20 of each ingredient. To the extent the formula is different for each flavor of BANG,  
21 state the formula for each flavor.

#### **INTERROGATORY NO. 2**

23       If YOU contend that BANG contains creatine, state all bases for YOUR  
24 contention.

#### **INTERROGATORY NO. 3**

26       If YOU contend that BANG contains creatine, identify all publications,  
27 research papers, and DOCUMENTS supporting YOUR claim, and *how* that source  
28 supports YOUR claim that BANG contains creatine.

1     **INTERROGATORY NO. 4**

2         If YOU contend that the “Super Creatine” in BANG creates positive health  
3 effects for drinkers, identify all publications, research papers, and DOCUMENTS  
4 supporting YOUR claim, and how that source supports YOUR claim that the “Super  
5 Creatine” in BANG creates positive health effects for drinkers.

6     **INTERROGATORY NO. 5**

7         State the locations and custodians of all DOCUMENTS and nonwritten files—  
8 including video and audio files—relating to the allegations and claims in Monster’s  
9 First Amended Complaint (ECF 61).

10

11 Dated: June 7, 2019

HUESTON HENNIGAN LLP

12

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By: /s/ Steven N. Feldman

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Steven N. Feldman  
Attorney for Plaintiff Monster  
Energy Company

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# EXHIBIT 2

1 John C. Hueston, State Bar No. 164921  
jueston@hueston.com  
2 Moez M. Kaba, State Bar No. 257456  
mkaba@hueston.com  
3 Steven N. Feldman, State Bar No. 281405  
sfeldman@hueston.com  
4 HUESTON HENNIGAN LLP  
523 West 6th Street, Suite 400  
5 Los Angeles, CA 90014  
Telephone: (213) 788-4340  
6 Facsimile: (888) 775-0898

7 Attorneys for Defendant  
8 MONSTER ENERGY COMPANY, a Delaware  
corporation

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

2 | MONSTER ENERGY COMPANY, a  
Delaware corporation,

**Plaintiff,**

vs.

VITAL PHARMACEUTICALS, INC.,  
d/b/a VPX Sports, a Florida corporation;  
and JOHN H. OWOC a.k.a. JACK  
OWOC, an individual,

## Defendants.

| Case No. 5:18-cv-1882-JGB-SHK

**PLAINTIFF MONSTER ENERGY  
COMPANY'S SECOND SET OF  
SPECIAL INTERROGATORIES TO  
DEFENDANT VITAL  
PHARMACEUTICALS, INC.**

PROPOUNDING PARTY: Plaintiff Monster Energy Company

RESPONDING PARTY: Defendant Vital Pharmaceuticals, Inc.

SET NO.: Two

PLAINTIFF MONSTER ENERGY COMPANY'S SECOND SET OF SPECIAL INTERROGATORIES TO  
DEFENDANT VITAL PHARMACEUTICALS, INC.

1       **PLEASE TAKE NOTICE** that Plaintiff Monster Energy Company hereby  
2 requests that Defendant Vital Pharmaceuticals Inc. d/b/a VPX Sports answer, in  
3 writing, the following Second Set of Interrogatories within thirty (30) days after  
4 service hereof pursuant to Federal Rule of Civil Procedure 33, *et seq.*

# **DEFINITIONS AND INSTRUCTIONS**

6       1. The terms "and" and "or" shall be construed conjunctively or  
7 disjunctively as necessary to make the Requests inclusive rather than exclusive; the  
8 singular shall include the plural and the plural shall include the singular; the use of a  
9 verb in any tense shall be construed as the use of the verb in all other tenses  
10 whenever necessary to bring within the scope of the Requests any response that  
11 might otherwise be construed outside their scope.

12        2. The term “BANG” refers to the Bang Energy line of energy drink  
13 products.

14       3. The term “DOCUMENT(S)” includes all written and graphic matter,  
15 however produced or reproduced, of any kind or description, whether sent or  
16 received or neither, including originals, non-identical copies, and drafts, and both  
17 sides thereof, including but not limited to: letters, correspondence, papers,  
18 memoranda, contracts, agreements, books, journals, ledgers, statements, reports,  
19 studies, billings, invoices, worksheets, jottings, projections, notes, abstracts,  
20 advertisements, drawings, audits, charges, balance sheets, income statements, checks,  
21 diagrams, diaries, calendar logs, recordings, instructions, lists, minutes of meetings,  
22 orders, resolutions, audio or visual images, facsimile transmissions, telegrams, wires,  
23 cables, telexes, electronic mail, messages, text messages, chat messages sent via any  
24 online messaging service (including, without limitation, WeChat, WhatsApp, Signal,  
25 Facebook Messenger, Instagram, Hangouts, Google chat, and Skype), comments and  
26 posts (whether text, photo, video, or otherwise) on SOCIAL MEDIA applications  
27 (including, without limitation, Facebook, Instagram, and Twitter), resumes,  
28 summaries, tabulations, tallies, statistical analyses, tapes, computer files stored by

1 any electronic means (including, without limitation, on cloud-based storage  
2 platforms such as Dropbox, Google Drive, iCloud, OneDrive, and SharePoint),  
3 computer printouts, and all other informal or formal writing or tangible things on  
4 which any handwriting, typing, printing, video or sound is recorded or reproduced,  
5 and any and all amendments or supplements to all of the foregoing, whether prepared  
6 by a party or another PERSON.

7       4. The term “SUBSTANCES” refers to all substances naturally produced  
8 by the human body, including creatine and creatinine.

9       5. The term “YOU” or “YOUR” refers to VPX, as well as its agents and  
10 representatives.

11       6. The term “VITALS” includes body temperature, blood pressure, heart  
12 rate, and respiratory rate.

13       7. The term “VPX” refers to Vital Pharmaceuticals, Inc. d/b/a VPX Sports,  
14 as well as its agents and representatives.

### **REQUEST FOR INTERROGATORIES**

#### **INTERROGATORY NO. 6**

17       Explain what the letters and numbers on the bottom of each BANG can refer  
18 to, including by identifying the information necessary to confirm date of production,  
19 location of production, production facility, and/or expiration date of the product  
20 indicated by each combination of letters and/or numbers. For reference, Exhibit A  
21 contains pictures of bottoms of a sample of BANG cans.

#### **INTERROGATORY NO. 7**

23       If YOU contend that the Super Creatine contained in BANG has an effect on  
24 the VITALS and SUBSTANCES in the human body, identify all such effects and all  
25 DOCUMENTS that support YOUR contention.

#### **INTERROGATORY NO. 8**

27       If YOU contend that the Super Creatine contained in BANG increases the  
28 circulating levels of creatine or creatinine in the human body, identify all bases

1 supporting YOUR contention, including the approximate amount of the alleged  
2 increases.

3  
4 Dated: July 10, 2019

HUESTON HENNIGAN LLP

5  
6 By: /s/ Steven N. Feldman

7 Steven N. Feldman  
8 Attorney for Plaintiff Monster  
Energy Company

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# EXHIBIT A

BEST BY  
030520 JAX 1813

Best By  
11/19 FB 1508



BEST BY  
12/24/2019 EXP 2018

## **PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On July 10, 2019, I served the foregoing document(s) described as:

**PLAINTIFF MONSTER ENERGY COMPANY'S SECOND  
SET OF SPECIAL INTERROGATORIES TO DEFENDANT  
VITAL PHARMACEUTICALS, INC.**

on the interested parties in this action as stated below:

E-MAIL: hheffner@gordonrees.com;  
tbranson@gordonrees.com; mkanach@grsm.com;  
mscully@grsm.com; sflynn@grsm.com;  
erica@ericawstump.com; frank.massabki@vpxsports.com;  
jlewis@grsm.com; marc@kestenlex.com

*Counsel for Defendants Vital Pharmaceuticals, Inc. and John H. Owoc*

- (BY E-MAIL) I transmitted a true copy of the foregoing document(s) to the e-mail addresses set forth above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 10, 2019, at Los Angeles, California.

Sourabh Mishra  
(Type or print name)

/s/ Sourabh Mishra  
(Signature)

# EXHIBIT 3

STEVEN N. FELDMAN

sfeldman@hueston.com

523 West 6<sup>th</sup> Street

Suite 400

Los Angeles, CA 90014

D: 213 788 4272

T: 213 788 4340

F: 888 775 0898

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## HUESTON HENNIGAN LLP

Wednesday, September 18, 2019

### VIA E-MAIL

Michael D. Kanach  
Gordon Rees Scully Mansukhani, LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111  
[mkanach@gordonrees.com](mailto:mkanach@gordonrees.com)

*Attorney for Defendants Vital Pharmaceuticals, Inc. & John H. Owoc*

Re: *Monster Energy Co. v. Vital Pharmaceuticals, Inc.*, No. 5:18-cv-01882-JGB-SHK,  
(United States District Court, Central District of California)

Dear Mr. Kanach:

I write regarding deficiencies in Defendants Vital Pharmaceuticals, Inc.'s ("VPX") response to Plaintiff Monster Energy Company's ("Monster") discovery requests. Specifically, I address herein Defendants' inadequate responses to Monster's (1) First Set of Special Interrogatories ("ROGs") to VPX; and (2) Second Set of ROGs to VPX.

In light of the below deficiencies, please let me know when you are available to meet and confer regarding the below issues and pursuant to Local Rule 37-1.

#### **I. Monster's ROGs Concerning VPX's Positions Relating to Super Creatine**

As VPX is aware, a key issue relating to Monster's false advertising claims is whether the alleged Super Creatine in BANG creates positive health effects for drinkers. (See, e.g., ECF 61 (FAC) ¶ 53.) Indeed, Judge Bernal, held in his motion to dismiss order that "the FAC makes the specific and fully consistent allegations that...(2) Super Creatine is unlike creatine in that it has no health benefits...." (ECF 95 at 14.)

Monster thus served multiple ROGs targeted at assessing VPX's positions and evidence relating to this claim. Specifically:

- **ROG No. 4.** "If YOU contend that the 'Super Creatine' in BANG creates positive health effects for drinkers, identify all publications, research papers, and DOCUMENTS supporting YOUR claim, and how that source supports YOUR claim that the 'Super Creatine' in BANG creates positive health effects for drinkers."
- **ROG No. 7.** "If YOU contend that the Super Creatine contained in BANG has an effect on the VITALS and SUBSTANCES in the human body, identify all such effects and all DOCUMENTS that support YOUR contention."

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## HUESTON HENNIGAN LLP

- **ROG No. 8.** “If YOU contend that the Super Creatine contained in BANG increases the circulating levels of creatine or creatinine in the human body, identify all bases supporting YOUR contention, including the approximate amount of the alleged increases.”

In its answer to these ROGs, Defendants largely provided the same response, that: (1) the ROGs seek expert testimony; (2) VPX has never made a contention that Super Creatine in BANG has an effect on the human body but reserves its right to do so; and (3) cites irrelevant articles that do not identify what effect Super Creatine has on the human body.

VPX’s offered responses are plainly inadequate. “Super Creatine” is a compound that VPX claims that its CEO developed and that only VPX can purportedly use in beverages based on its patent. There is no reason why VPX cannot state its position and any support for how the Super Creatine in BANG affects the human body, including, but not limited to, whether it creates positive health effects on its own, whether it has an effect on the vitals and substances in the human body, and whether it increases the circulating levels of creatine in the human body. Indeed, it would be surprising if VPX did not already have this information, as it has widely marketed the Super Creatine in BANG and sold BANG beverages that allegedly contain Super Creatine.

With the upcoming opening expert report deadline and fact discovery deadline, it is imperative that VPX promptly supplement its responses to clearly identify its position with respect to how the Super Creatine in BANG affects the human body.

### II. Monster’s ROG Concerning the BANG Can

In **ROG No. 6**, Monster asked that VPX “Explain what the letters and numbers on the bottom of each BANG can refer to, including by identifying the information necessary to confirm date of production, location of production, production facility, and/or expiration date of the product indicated by each combination of letters and/or numbers.” To make clear what letters and numbers the ROG referred to, Monster attached Exhibit A as an example with pictures of bottoms of a sample of BANG cans.

In response, VPX stated generally what the letters and numbers refer to, but only included the requested specific information about the four sample cans that Monster provided.

VPX’s response is incomplete. To fully answer this ROG, VPX must identify all of the location symbols that VPX uses on BANG and what they refer to. Moreover, VPX must identify how a person can determine the date of production, including, but not limited to, by using the “best by” date.

\*\*\*

As stated above, Monster wishes to resolve these disputes without Court intervention and thus respectfully requests that Defendants provide a time that they are available to meet and confer. If Defendants do not provide such a time, Monster intends to move to compel.

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**HUESTON HENNIGAN LLP**

Sincerely,



Steven N. Feldman

cc: Other counsel of record

# EXHIBIT 4

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**From:** Sourabh Mishra  
**To:** Michael Kanach  
**Cc:** hheffner@grsm.com; Steven N. Feldman; Michael Todisco; tbranson@grsm.com; sfrey@grsm.com; Moez M. Kaba  
**Subject:** RE: Monster v VPX - VPX Supplementing Interrogatories  
**Date:** Monday, November 4, 2019 4:23:14 PM

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Michael,

We have discussed the point you raised below multiple times by e-mail and phone. To name just one example:

- In the October 1 email below, you stated: "Please point to the specific statements where you believe VPX has made those contentions . . ."
- The same day, I responded: "It seems from your below e-mail that VPX's position is that it has never claimed that the Super Creative in BANG creates positive health effects. As shown by, among other things, paragraphs 46 to 48 of the First Amended Complaint ('FAC'), this is wrong. Monster is simply seeking VPX's support for its positions based on the information in its possession, as is its right."
- And then on October 11, you claimed: "VPX is working on a response to supplement those 4 interrogatories and anticipates serving it on Monster within 2 weeks, by October 25."

You then last week served interrogatory responses that do not address the deficiencies Monster identified and now are making the *same* flawed arguments you made more than a month ago before you agreed to supplement. Based on these responses and your email below, Monster is forced to conclude that VPX is not willing to state whether it is or is not taking these positions.

Monster thus has no choice but to move to compel. We will let the Court know that the parties are available on November 5, 8, 12, and 13.

Regards,  
Sourabh

**Sourabh Mishra**  
D: 949.356.5536

---

**From:** Michael Kanach <mkanach@grsm.com>  
**Sent:** Monday, November 4, 2019 3:24 PM  
**To:** Sourabh Mishra <smishra@houston.com>  
**Cc:** hheffner@grsm.com; Steven N. Feldman <sfeldman@houston.com>; Michael Todisco <mtodisco@houston.com>; tbranson@grsm.com; jmdoherty@grsm.com; sfrey@grsm.com; Moez M. Kaba <mkaba@houston.com>  
**Subject:** RE: Monster v VPX - VPX Supplementing interrogatories

Hi Sourabh,

I understand Monster doesn't like the answers to which VPX has responded, for the "if you contend" contention interrogatories (Interrogatories 4, 7, and 8), which are essentially hypothetical questions at this point. If you believe that these are not hypothetical statements, please point us to those specific contentions so VPX can review and supplement if necessary.

We have conducted a reasonable investigation (which continues via the document review under way) in an effort to furnish all information available to VPX; however, at this time, we are still not aware of any such contentions made by VPX. As you know, we asked and Monster has not provided any information for where VPX has made those contentions. For example, as addressed in the supplemental interrogatory responses, Monster stated during meet and confer discussions that there were statements in the allegations in specific paragraphs of the First Amended Complaint. We reviewed those statements and related video and public statements from VPX and Jack Owoc and have determined that those half-quotations were not made about the creatyl-l-leucine in BANG. Monster has not – despite requests for this information – provided any information for where these half quotes originate.

If you point us to specific statements that Monster claims VPX has made related to these interrogatories, VPX can review those and try to avoid unnecessary motion practice.

If Monster does not want to provide this information and would rather move the court to compel further supplemental interrogatory responses, Holly and I are available November 12 and 13.

Regards, -MIKE

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**MICHAEL D. KANACH** | Partner

**GORDON REES SCULLY MANSUKHANI**  
**YOUR 50 STATE PARTNER™**

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanach@grsm.com](mailto:mkanach@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

---

**From:** Sourabh Mishra <smishra@houston.com>  
**Sent:** Sunday, November 3, 2019 5:42 PM  
**To:** Michael Kanach <mkanach@grsm.com>  
**Cc:** Holly Heffner <hheffner@grsm.com>; Steven N. Feldman <sfeldman@houston.com>; Michael Todisco <mtodisco@houston.com>; Timothy Branson <tbranson@grsm.com>; JoAnna Doherty <jmdoherty@grsm.com>; Sara Anderson Frey <sfrey@grsm.com>; Moez M. Kaba <mkaba@houston.com>  
**Subject:** RE: Monster v VPX - VPX Supplementing interrogatories

Michael,

We have not heard from you on the below. We intend to e-mail Judge Kewalramani by close of business tomorrow with our availability for a pre-motion telephonic

hearing: November 5, 8, 11, 12, and 13. Please let us know if any of these dates do not work for you. If we do not hear from you by 5pm PT tomorrow, we will assume all of those dates work for you.

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Thursday, October 31, 2019 3:58 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com); Moez M. Kaba <[mkaba@hueston.com](mailto:mkaba@hueston.com)>  
**Subject:** RE: Monster v VPX - VPX Supplementing interrogatories

Michael,

We received VPX's supplemental responses this morning. Despite Monster's willingness to provide VPX an additional 2 weeks to supplement these responses, VPX has still not answered the questions requested by the interrogatories.

For example, we still cannot tell from VPX's eight-page answer to Interrogatory 4 whether VPX contends that the Super Creatine in BANG creates positive health effects for drinkers. If the answer is yes, VPX must provide what those positive health effects are and its support, which VPX has still not done. If the answer is no, VPX must clearly state so in its response, which VPX has also not done.

Similarly, we cannot tell from VPX's confusing and meandering responses to Interrogatories 7 and 8 whether VPX contends that the Super Creatine contained in BANG has an effect on the VITALS and SUBSTANCES in the human body and whether VPX contends that the Super Creatine contained in BANG increases the circulating levels of creatine or creatinine in the human body. Again, VPX needs to clearly state whether the answer to either question is yes or no and, if yes, provide its basis.

Based on these responses, Monster is forced to move forward to compel responses to Interrogatories 4, 7, and 8 next week with Magistrate Kewalramani and will send him an e-mail tomorrow evening with the availability for a telephonic conference that you included in your e-mail below.

However, if VPX supplements the above interrogatories in a straightforward and clear manner—including, but not limited to, answering the precise questions posed by the interrogatories—by 5 pm PT tomorrow, Monster is willing to consider putting off the conference for now. Without receiving an additional supplementation by then, Monster will send Magistrate Kewalramani an e-mail tomorrow evening.

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Friday, October 25, 2019 7:59 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** Monster v VPX - VPX Supplementing interrogatories

Sourabh,  
Given Defendants' deadline next Wednesday related to the objections to the Magistrate Judge's Order compelling production of BANG's formula, VPX anticipates that it will supplement Interrogatory No. 1 on that day along with filings its objections.  
In connection with those objections and likely supplementation of that interrogatory, we are still working on the supplemental responses to other interrogatories (4, 6, 7, 8) and will do so on Wednesday next week.

In your prior email, you asked for dates available the week of November 4<sup>th</sup> in the event that Monster chooses to move to compel with respect to those supplemented Interrogatories, even after VPX supplements them. I can be available on the 4<sup>th</sup>, 5<sup>th</sup>, or 8<sup>th</sup>.

Regards, -MIKE

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Friday, October 11, 2019 4:31 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>; Joanna Doherty <[jmdoherty@grsm.com](mailto:jmdoherty@grsm.com)>; Sara Anderson Frey <[sfrey@grsm.com](mailto:sfrey@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

Thank you for your e-mail. We hope that VPX's supplemental response will sufficiently address the deficiencies in its interrogatory responses. Please confirm by Monday, 10/14, that VPX's supplemental responses will include the substantive responses that Monster has requested throughout this meet and confer process.

If Monster does not receive interrogatory responses by October 25 or the supplemental responses do not sufficiently address the deficiencies, we will have no choice but to request a prompt telephonic conference with Judge Kewalramani for the week of November 4. Please be prepared to promptly give us your availability for a telephonic conference for that week. We cannot delay this issue any longer.

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Friday, October 11, 2019 4:22 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Hi Sourabh,  
Thanks for your email.

VPX is working on a response to supplement those 4 interrogatories and anticipates serving it on Monster within 2 weeks, by October 25.

Regards, -MIKE

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Friday, October 11, 2019 4:17 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>; JoAnna Doherty <[jmdoherty@grsm.com](mailto:jmdoherty@grsm.com)>; Sara Anderson Frey <[sfrey@grsm.com](mailto:sfrey@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael – What is your final answer on the below? We'll assume that you are available Tuesday (10/15); Thursday (10/17); and Friday (10/18) for a conference with Judge Kewalramani if we do not hear otherwise from you today.

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Tuesday, October 8, 2019 12:28 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

As I stated in our correspondence below, I hope that taking this extra time is in furtherance of a genuine desire to meet and confer to resolve our disputes and not simply a delay tactic. We look forward to your final response by this Friday, 10/11, at 4pm PT. If VPX is not willing to amend as Monster requests, please let us know which three days next week you are available for a telephonic conference with Judge Kewalramani: Monday (10/14); Tuesday (10/15); Thursday (10/17); and/or Friday (10/18).

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Monday, October 7, 2019 3:45 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Hi Sourabh,  
I am hoping to provide you with a further response by this Friday as to supplementation of those 3 interrogatories.  
As you know, we have been parallel-tracking several discovery matters with Monster in this case including last week's document production, ongoing meet and confer regarding both parties' proposed search terms and objections, and objections to discovery to third party customers (GNC and The Vitamin Shoppe). We will let you know if we have a final position sooner.

Regards, -MIKE

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**MICHAEL D. KANACH** | Partner

**GORDON REES SCULLY MANSUKHANI**  
**YOUR 50 STATE PARTNER™**

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanach@grsm.com](mailto:mkanach@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Friday, October 4, 2019 3:39 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>; JoAnna Doherty <[jmdoherty@grsm.com](mailto:jmdoherty@grsm.com)>; Sara Anderson Frey <[sfrey@grsm.com](mailto:sfrey@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

When do you expect to provide us with a final position on whether VPX will agree to supplement interrogatories 4, 7, and 8? It has now been well beyond ten days since Monster served its LR 37-1 letter and so Monster is well within its right to begin the formal motion to compel process.

If you cannot send us a final answer by **Monday, October 7 at 5pm PT**, we will e-mail Judge Kewalramani and offer Tuesday, Thursday, and Friday as the parties' availability for a telephonic conference. Please let us know as soon as possible.

Regards,  
Sourabh

**Sourabh Mishra**

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**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Friday, October 4, 2019 3:33 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Hi Sourabh,  
We are still considering Monster's request to VPX to supplement certain interrogatories. You asked for our position by today. I don't have a final position.

Regards, -MIKE

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Tuesday, October 1, 2019 5:55 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>; JoAnna Doherty <[jmdoherty@grsm.com](mailto:jmdoherty@grsm.com)>; Sara Anderson Frey <[sfrey@grsm.com](mailto:sfrey@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

It would have been helpful if you had requested the below clarifications during the 10 days provided in LR 37-1 for the parties to meet and confer. We hope that your below requests are truly in furtherance of a genuine desire to meet and confer and not simply a delay tactic.

With respect to your questions:

1. Interrogatory No. 4 asks whether VPX contends that the "Super Creatine" in BANG creates positive health effects and, if so, what the support for that is. It seems from your below e-mail that VPX's position is that it has never claimed that the Super Creatine in BANG creates positive health effects. As shown by, among other things, paragraphs 46 to 48 of the First Amended Complaint ("FAC"), this is wrong. Monster is simply seeking VPX's support for its positions based on the information in its possession, as is its right. Relatedly, Interrogatories Nos. 7 and 8 further attempt to clarify these health effects by asking how the Super Creatine in BANG effects the vitals, substances, and circulating levels of creatine in the body. To reiterate, it would be surprising if VPX did not have this type of basic information about the effects of its own product on humans – especially when it makes claims about the health effects of Super Creatine – and thus Monster is not requesting any information that VPX should not reasonably already have in its possession. This thus does not implicate a need for expert testimony at this stage.
2. Interrogatories Nos. 4, 7, and 8 relate to Monster's false advertising claims in its First, Second, and Third Causes of Action. And they also relate to Monster's allegation in paragraph 53 of the FAC that the Super Creatine in BANG is useless.
3. Interrogatories Nos. 4, 7, and 8 all request information relating to the "Super Creatine contained in BANG" or "in BANG." This necessarily relates to the effect of the amount of Super Creatine in BANG.

That said, it has now been 13 days since Monster served its LR 37-1 letter. Please provide us with VPX's final position by **4pm PT this Friday, October 4** so that we can either settle this discovery dispute or bring it to the attention of the Court. If VPX is not willing to amend its interrogatory responses, please let us know which three days next week (other than Wednesday (10/9)) you are available for a telephonic conference with the Court.

Regards,  
Sourabh

Sourabh Mishra

---

HUESTON HENNIGAN LLP

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Tuesday, October 1, 2019 4:42 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Hi Sourabh,

First, I will start by saying that VPX is still considering your request that VPX amend its responses to provide further substantive responses – in addition to the substantive responses already provided.  
This email is intended to move the discussion forward.

Second, Monster's interrogatories are drafted as "if you contend" and I have not been able to locate any statements in this litigation or otherwise where VPX has made the contentions referred to in these interrogatories. Essentially, Monster is serving early contention interrogatories where VPX hasn't even made those contentions; and VPX maintains its objections that this is not proper at this time and that they seek early expert testimony. To that end, I will note that Monster appears to be recognizing that these interrogatories are contention interrogatories and require expert testimony, regardless of how VPX responds.

As mentioned above, however, VPX is still considering Monster's meet and confer positions.  
To the extent Monster believes that VPX has made these contentions in the past, please advise so that VPX can consider these Interrogatories in context (or as you put it "VPX's current knowledge" or "to the best of their knowledge").  
Please point to the specific statements where you believe VPX has made those contentions (either by providing a link or an attachment, etc.).

Third, I suspect the Court will likely ask which causes of action these contentions relate to, so please advise.  
I don't see how these interrogatories are relevant to the remaining causes of action brought by Monster which were not dismissed.

Fourth, it seems from your email that you are reframing your Interrogatory requests to seek information that the Interrogatories do not seek.  
Specifically, your email below references the amount of an ingredient, but that is not what the interrogatories ask for.

We look forward to your response to #2 and #3 so VPX can continue to discuss the sufficiency of VPX's responses to these interrogatories.

Regards, -MIKE

---

MICHAEL D. KANACH | Partner

GORDON REES SCULLY MANSUKHANI

YOUR 50 STATE PARTNER™

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanachi@grsm.com](mailto:mkanachi@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

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**From:** Sourabh Mishra <[smishra@houston.com](mailto:smishra@houston.com)>  
**Sent:** Sunday, September 29, 2019 6:52 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@houston.com](mailto:sfeldman@houston.com)>; Michael Todisco <[mtodisco@houston.com](mailto:mtodisco@houston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>; JoAnna Doherty <[jmdoherty@grsm.com](mailto:jmdoherty@grsm.com)>; Sara Anderson Frey <[sfrey@grsm.com](mailto:sfrey@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

Thank you for confirming that VPX intends to supplement its response to Interrogatory No. 6, the interrogatory concerning can stamps. We look forward to receiving that amended response soon.

With respect to the interrogatories concerning the Super Creatine in BANG discussed in Monster's Rule 37-1 letter, I believe we discussed each of the issues presented in your e-mail below during our September 23 meet and confer. To reiterate, Monster is permitted in discovery to understand what VPX's current knowledge and positions are on these issues, regardless of who has the ultimate burden of proof at trial. See, e.g. *Sony Corp. v. Vizio, Inc.*, 2009 WL 10675358, at \*2 (C.D. Cal. Oct. 23, 2009) ("[T]he parties must respond fully and completely to all discovery requests to the best of their knowledge, based on the information they have to date."). It would be very surprising if VPX did not have internal information about basic facts about the effect of the Super Creatine in BANG on humans when it has been selling BANG in this form for several years. Your current responses are insufficient because they do not provide that basic information requested by interrogatories served; for example, how does the amount of the Super Creatine in BANG affect body temperature, blood pressure, heart rate, and circulating creatine levels in the body?

Again, Monster wants to resolve this issue as soon as possible. Please let us know by **Tuesday, October 1 by 5pm PT** if VPX intends to supplement its answers to Interrogatories 4, 7, and 8 to answer the queries posed by those interrogatories. If VPX does not intend to supplement its answer, we will e-mail Judge Kewalramani to set up a telephonic conference on this issue, and so please let us know by that same time if Wednesday (10/2), Thursday (10/3), and Friday (10/4) of this week do not work for you. (If any of those dates do not work, please offer alternate dates of availability.)

Regards,  
Sourabh

Sourabh Mishra

HUESTON HENNIGAN LLP

D: 949.356.5536  
[smishra@houston.com](mailto:smishra@houston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Friday, September 27, 2019 4:06 PM  
**To:** Sourabh Mishra <[smishra@houston.com](mailto:smishra@houston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@houston.com](mailto:sfeldman@houston.com)>; Michael Todisco <[mtodisco@houston.com](mailto:mtodisco@houston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** Re: [Monster/VPX] Meet and Confer re Search Terms

Hi Sourabh,  
At this time, we are still in discussion with our client about Monster's request that VPX consider amending the Interrogatories referenced in your letter. I understand VPX will supplement its response to at least one Interrogatory (#8 as to can stamps), but that supplemented response is not ready to serve today.

To help assess your position, can you please provide Monster's basis for why a non-expert opinion from a corporate defendant, VPX, is relevant to issues (legal contentions) for which the jury may rely on experts? I will note that Monster, who has not disputed that it has the burden, has not provided any initial expert or non-expert position for VPX to rebut.

Can you please also explain why Plaintiff believes Defendants' responses so far are not sufficient in response to those Interrogatories? Your email below misrepresents the actual responses (below you state "With respect to VPX's positions relating to creatyl-L-leucine, you claim that it is a matter for expert discovery and that VPX will not offer a substantive position before expert discovery.") Your email is not accurate. VPX has provided substantive responses. Please let us know why you believe those responses are not sufficient (other than because Monster seeks early expert disclosures).

Regards, -MIKE

On Sep 27, 2019, at 2:52 PM, Sourabh Mishra <[smishra@houston.com](mailto:smishra@houston.com)> wrote:

Michael,

Have you had a chance to check with your client about the parties' dispute concerning VPX's positions relating to creatyl-L-leucine presented in Monster's Rule 37-1 letter? If VPX does not anticipate changing its position on this issue, please send us three days you are available for a telephonic conference with Judge Kewalramani. We are available next week on Wednesday, Thursday, and Friday. We can also be available the week after, but we would like to settle this dispute as soon as possible.

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Tuesday, September 24, 2019 3:56 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Hi Sourabh,  
We are looking into it.  
We are also preparing a first set of document production, which will give us a better idea of timing.

(While this reply addresses your follow up email, I will note that this email does not attempt to correct differences in the summary below – some of which we have already addressed separately.)

Regards, -MIKE

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**MICHAEL D. KANACH | Partner**

**GORDON REES SCULLY MANSUKHANI**  
**YOUR 50 STATE PARTNER™**

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanach@grsm.com](mailto:mkanach@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

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**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Tuesday, September 24, 2019 3:52 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>; JoAnna Doherty <[jmdoherty@grsm.com](mailto:jmdoherty@grsm.com)>; Sara Anderson Frey <[sfrey@grsm.com](mailto:sfrey@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

You had said that you would let us know by yesterday if next Tuesday, 10/1, is realistic for VPX's first production of documents. Can you please let us know?

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Monday, September 23, 2019 6:08 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Michael,

Thanks for speaking with us today. I'm sending this email to summarize our call to ensure that we're on the same page moving forward. Any time frames discussed on our call are **bolded** below.

**Search Terms**

Both parties have previously sent objections to certain search terms. We agreed that by this **Wednesday, September 25, at 4 p.m.**, both parties will respond to the other side's objections by, for example, withdrawing the search term, narrowing the search term, or standing by the term as written.

**Production Schedule**

We discussed beginning rolling productions **by next Tuesday, October 1**, for those search terms that neither party objected to. You stated that you would follow up with us **today** about whether your vendor would have issues meeting that schedule. You also stated that certain non-ESI information might be ready for earlier production.

**Production of Social Media Information**

You stated that you would provide Monster with a list of VPX/Owoc social media accounts and document production related to several of those accounts.

**Third-Party Subpoenas**

- Dr. Antonio: We stated that we have taken Dr. Antonio's deposition off calendar and are likely to reschedule for October or November.
- ISSN: We informed you that we had not yet heard from ISSN's counsel. You requested that we provide proof of service, which we will send separately.
- GNC & Vitamin Shoppe: You requested that we withdraw our document subpoenas to GNC and Vitamin Shoppe. We declined. You then stated that you would send further objections in writing regarding your basis for a motion to quash.

You also expressed concern that our subpoenas seek privileged information. We clarified that we are seeking only non-privileged documents and only require that the third parties produce a privilege log if they are withholding documents based on privilege grounds, as is typical and required. You further stated that you would provide us information about Mr. Kesten's potential representation of Vitamin Shoppe so that we can consider your request to narrow our subpoena.

Your e-mail below mischaracterizes Monster's positions, the parties' ongoing meet and confers about search terms, and the relevance of these third party documents. For example, your point below that the terms "GNC," "Vitamin Shoppe," and others are directed toward litigation documents is misguided and incorrect. Indeed, as we mentioned on the call, the issue of *why* retailers are choosing to stock BANG and what they believe differentiates BANG from other products is clearly relevant to this litigation. That issue should not pose any "privilege" concerns.

You also requested proof of service for the ISSN, GNC, Vitamin Shoppe subpoenas. We will send those separately. With respect to Dr. Antonio, as discussed, Dr. Antonio's counsel accepted service of his subpoenas.

**Monster Responses to RFPs 90-93**

You had asked to meet and confer about VPX's RFP requests relating to formulas. We agreed that Judge Kewalramani's order on VPX's motion to compel Monster's Reign formula will inform this dispute and that we would discuss those requests after he issues his order.

You also asked to meet and confer regarding Monster's M Claw trade dress. You stated that you would send us Rule 37-1 letter describing your basis for requesting this information.

**Monster's Rule 37-1 Letter**

We discussed Monster's Rule 37-1 letter. You stated that you hadn't had the chance to speak with your client yet about this request.

With respect to VPX's positions relating to creatyl-L-leucine, you claim that it is a matter for expert discovery and that VPX will not offer a substantive position before expert discovery. With respect to the letters and numbers on the bottom of BANG can, we discussed that Monster requires VPX to identify all iterations of the production facility code and what they correspond to; and to disclose how the "best by" date relates to the production date of an individual can.

We will follow up this **Friday, September 27** to see if you have had a chance to check with your client on these issues and/or if there is any chance to resolve our disagreements.

\*\*

Regards,  
Sourabh

Sourabh Mishra

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
[smishra@hueston.com](mailto:smishra@hueston.com)  
[Biography](#)

---

**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Monday, September 23, 2019 3:29 PM  
**To:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Cc:** [hheffner@grsm.com](mailto:hheffner@grsm.com); Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>; [tbranson@grsm.com](mailto:tbranson@grsm.com); [jmdoherty@grsm.com](mailto:jmdoherty@grsm.com); [sfrey@grsm.com](mailto:sfrey@grsm.com)  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Sourabh and Steven,  
As discussed on our meet and confer call today, below are the email search terms to which I said Defendants are specifically objecting based on privilege, in addition to Thermolife.  
These terms seem aimed specifically at litigation-related documents.

1. GNC
2. Vitamin Shoppe
3. Thermolife
4. Jose Antonio
5. Catherine w/3 Davis (an attorney)

As discussed during today's call, Defendants will provide further comments regarding the search terms VPX proposed to which Monster objected – and that mutual exchange will take place on Wednesday at 4pm PST.

**Privileged documents:**

Mr. Feldman mentioned on today's call that Monster was not specifically seeking the prior litigation documents from VPX relating to GNC and Vitamin Shoppe. He said you were not aware of prior litigation involving Thermolife and Vitamin Shoppe where Marc Kesten was counsel for Vitamin Shoppe. You asked us to provide proof. See US District Court case 0:16-cv-60691 in the Southern District of Florida: WERTEKS CLOSED JOINT STOCK COMPANY d/b/a WERTEKS PHARMACEUTICAL COMPANY and THERMOLIFE INTERNATIONAL, LLC v. VITAMIN SHOPPE, INC., and VITAL PHARMACEUTICALS, INC. d/b/a VPX. The docket is clear in that case that Mr. Kesten made an appearance on behalf of Vitamin Shoppe in November 2016, and that case is currently on appeal. GNC was likewise sued by Wertek and Thermolife.

Mr. Feldman mentioned that Monster was not seeking privileged documents from GNC or Vitamin Shoppe, however, he also said that Monster would *not* specifically narrow the requests to obviate the need for review and production of a privilege log. We request that you reconsider your position.

With respect to Vitamin Shoppe, GNC, and Jose Antonio, we expect Monster will continue to meet and confer as to search terms (i.e., Monster will propose narrower terms instead of withdrawing those search terms). We suspect the parties' efforts to further meet and confer as to those terms may obviate the need for Monster's subpoenas to those third parties (specifically GNC, Vitamin Shoppe, and Jose Antonio) seeking duplicate information and documents. Until then, Defendants continue to object to Monster's subpoenas to those third parties for the reasons raised in Defendants' written objections including those based on privilege, harassment, and proportionality, to name a few.

We understand from today's call that Monster is not willing to either withdraw those subpoenas or amend the scope of the broad document requests. We also note you represented during today's call that those subpoenas to GNC and Vitamin Shoppe were broader than the document requests you sent to VPX. And you used that as a basis for seeking documents from the third parties instead of from VPX. That is not proper and appears to be in contrast to the Stipulated ESI Order (ECF 126) where the parties agreed to work together to limit discovery to relevant documents, custodians, and search terms. Now, instead, Monster is using subpoenas as an "end run" around the ESI order.

Again, Defendants raise our objections related to proportionality and harassment of these third parties, including VPX's customers, and ask that Monster withdraw these subpoenas to GNC and Vitamin Shoppe.

As requested on today's call, please provide us with proof of service of the subpoena and witness fees to GNC, Vitamin Shoppe, Jose Antonio, and ISSN.

Regards, -MIKE

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**MICHAEL D. KANACH | Partner**

**GORDON REES SCULLY MANSUKHANI**  
**YOUR 50 STATE PARTNER™**

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanach@grsm.com](mailto:mkanach@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

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**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Friday, August 30, 2019 10:10 AM

**To:** Sourabh Mishra <[smishra@ueston.com](mailto:smishra@ueston.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@ueston.com](mailto:sfeldman@ueston.com)>; Michael Todisco <[mtodisco@ueston.com](mailto:mtodisco@ueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>  
**Subject:** RE: [Monster/VPX] Meet and Confer re Search Terms

Sourabh,

Here are the remaining terms. We think this is everything Monster proposed.  
We apologize for the fact that our vendor missed these terms and given the number of terms we did not realize this earlier.

**Objections Based on Relevance, Overbroad, Number of Hits, and Proportionality, and further objections referenced in the chart below:**

MONS* OR MNST OR Sacks OR Hilton OR Schlosberg
Creat* - over 300,000 hits, overbroad, relevance. Note: VPX has agreed to review other more narrow terms which contain this "creat" prefix with other terms.
(SUPER w/3 CREATINE) OR "creatyl-l-leucine" OR (creatyl w/3 leucine) OR supercreatine OR "Super Creatine" – overbroad
(stud* OR test* OR Scien*) w/50 (sponsor* OR fund* OR pay* OR paid OR promot* OR support*) – overbroad, relevance, seeks publicly available information about what public studies VPX sponsored/promoted/supported, etc.
(shelf w/3 space) OR (retail w/3 space) OR ((place* OR arrang*) w/10 BANG) OR (retail w/50 (shelf OR cooler)) – overbroad, relevance.
contract w/50 (retail* OR distrib* OR store*) – over 75,000 hits, overbroad, relevance, seeks proprietary business information unrelated to this case.

Regards, -MIKE

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MICHAEL D. KANACH | Partner

GORDON REES SCULLY MANSUKHANI  
YOUR 50 STATE PARTNER™

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanach@grsm.com](mailto:mkanach@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

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**From:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Sent:** Thursday, August 29, 2019 12:28 PM  
**To:** Sourabh Mishra <[smishra@ueston.com](mailto:smishra@ueston.com)>  
**Cc:** Holly Heffner <[hheffner@grsm.com](mailto:hheffner@grsm.com)>; Steven N. Feldman <[sfeldman@ueston.com](mailto:sfeldman@ueston.com)>; Michael Todisco <[mtodisco@ueston.com](mailto:mtodisco@ueston.com)>; Timothy Branson <[tbranson@grsm.com](mailto:tbranson@grsm.com)>  
**Subject:** Re: [Monster/VPX] Meet and Confer re Search Terms

Sourabh,  
In reviewing previous emails today between counsel, and comparing to the list of objections we sent to you last night, we just realized our vendor did not provide us with hit information for all of the search terms you provided to us. This was not intentional. And we are looking into it. However, more importantly, we have requested the hit reports again.

We will follow up with further information once we receive it from our vendor and have an opportunity to review.

Regards, -MIKE

Sent from my iPhone

On Aug 28, 2019, at 11:59 PM, Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)> wrote:

Hi Sourabh,  
Thanks for your email. The email below is on behalf of Owoc and VPX, even where it just refers to VPX.

I will begin by saying we are still reviewing some of these objections and non-objectable terms with our vendor to try to determine proposed ways to make some of these search terms more manageable (either by reducing the number and/or by targeting to documents that are more likely to be relevant and responsive), and to determine if there are any further bases for objections.

Below are terms to which we do not currently object based on the search terms by themselves, followed by objections and some proposed solutions (some of which we discussed on our call yesterday).

We are working with our vendor to determine the burden of this review set based on quantity of direct hits and families and unique hits, so we can determine if we have any further objections or solutions, including limiting searches to date ranges or specific custodians. Likewise, we also reserve the right to continue to meet

and confer after review begins if additional burdens or proportionality concerns arise, including related to redactions (e.g., formulas). Defendants do not waive any objections raised in their responses to requests for documents, including as to responsiveness, relevance, proportionality, privileged, and the other objections raised.

We also have a list below of search terms to which we object based on relevance and we seek Monster's position as to why they are relevant to Monster's claims or VPX's defenses in this case. We also object to one term based on privilege and we object with respect to Marc Kesten who is in house counsel with respect to privilege.

**No current objections to these terms:**

1. BANG w/50 creatinine
2. BANG w/50 influenc*
3. GRAS AND ((SUPER w/3 CREATINE) OR creatyl-l-leucine OR (creatyl w/3 leucine) OR creat*)
4. Recruit* w/50 pric*
5. GRAS AND creat*
6. BANG AND psychomot*
7. BANG AND (blood w/50 brain w/50 barrier)
8. BANG AND depress*
9. BANG AND "cell swell"
10. BANG AND (water w/50 retention)
11. BANG AND cogniti*
12. BANG AND (attention w/50 span)
13. BANG AND neuroprotec*
14. BANG AND "antioxidant"
15. BANG AND (creat* w/50 transport w/50 deficiency w/50 syndrome)
16. BANG AND artificial
17. REIGN w/50 (trademark OR first OR rip-off OR ripoff)
18. Vigorous w/3 train* w/3 program
19. Patent w/50 BANG
20. 466 w/3 patent
21. Owoc w/50 inventor
22. ISSN
23. (sports w/3 nutrition w/3 society)
24. Kalman
25. "Ziegenfuss Rawson"
26. Schwartz
27. BANG AND ("UCLA")
28. BANG AND ("Florida State")
29. BANG AND ("Baylor")
30. BANG AND ("Southern Maine")
31. BANG AND (Nova)

**Search Terms that Must be Narrowed**

Objections with Proposed Solutions:

Below are some objections we have as to relevance, number of hits and proportionality, and proposed potential solutions that we are looking into.

Some of these solutions we discussed during the call on August 27, 2019. We need to continue discussions with our vendor to see if these proposals make a difference and how much of a difference they make with respect to narrowing. We will need to follow up with you after we receive further information.

Objectionable Term	Proposed Solution
1. Jose OR Antonio OR ISSN OR (sports w/3 nutrition w/3 society) OR Kalman OR "Ziegenfuss Rawson" OR Schwartz	<ul style="list-style-type: none"> <li>As discussed on our call August 27 call, we are working with our vendor to determine whether "Jose /3 Antonio" remains objectionable. Monster proposed that narrower term.</li> <li>As set forth in the chart above, VPX removed objections to the remaining terms: OR ISSN OR (sports w/3 nutrition w/3 society) OR Kalman OR "Ziegenfuss Rawson" OR Schwartz</li> <li>Over 100,000 hits</li> </ul>
2. BANG w/50 (Insta* OR Faceb* OR FB OR IG OR Twit* OR Yout* OR (social w/3 media))	<ul style="list-style-type: none"> <li>As discussed on our call August 27 call, we are working with our vendor to determine whether <u>full spelling</u> of the names of these social media companies (Instagram, Facebook, Twitter, and Youtube) to replace these shorthand references remains objectionable. Monster appeared willing to agree to those narrower terms.</li> <li>Over 100,000 hits</li> </ul>
3. REIGN OR (Royalt* w/5 nutrit*)	<ul style="list-style-type: none"> <li>We are working with our vendor to determine whether "REIGN AND (Royalty* w/5 nutrit*)" remains objectionable. This potential proposal was not discussed during our call.</li> </ul>
4. BANG AND ("UCLA" OR "Florida State" OR "Baylor" OR "Southern Maine" OR "Tampa" OR "Pittsburgh" OR "Memphis" OR Nova)	<ul style="list-style-type: none"> <li>As discussed on our call August 27 call, we are working with our vendor to determine whether adding the word "University" to the terms (1) Tampa, (2) Pittsburgh, and (3) Memphis remains objectionable. Monster appeared willing to agree to those narrower</li> </ul>

	<p>terms.</p> <ul style="list-style-type: none"> <li>As set forth in the chart above, VPX removed objections to the remaining terms: BANG AND ("UCLA" OR "Florida State" OR "Baylor" OR "Southern Maine" OR Nova)</li> <li>We are working with our vendor to determine whether adding BANG to this search term remains objectionable. This potential proposal was not discussed during our call.</li> <li>However, we did discuss the BANG AND NOVA term, discussed above (#4 of this section).</li> </ul>
5. Nova OR (Southeast* w/5 (univ* OR coll* OR Florid*)) OR NSU	

[Objections Based on Relevance, Overbroad, Number of Hits, and Proportionality, and further objections referenced in the chart below:](#)

1. Anheuser OR Busch OR Anheuser-Busch OR "AB" – third party
2. Stephen w/3 Cohen
3. Laitinen OR McMahon – custodians, overbroad
4. GNC OR (Vita* w/3 Shop*) – third parties, over 75,000 hits
5. Owoc w/50 (author OR write* OR book OR article OR journal*) – custodians, overbroad
6. Sponsor* w/50 BANG
7. BANG w/50 (market* OR advert*) – over 200,000 hits
8. BANG w/50 dev* -- redaction concerns relating to formula
9. ("Red Bull" OR "RB") AND (recruit* OR pric*) – third parties
10. BANG AND ("health" OR phys*)
11. Consum* AND compl* -- over 75,000 hits
12. FTC OR "Federal Trade" OR NAD OR (National w/2 advertising w/2 division) – third parties
13. BANG w/50 (design OR packag* OR formu*) -- redaction concerns relating to formula, over 100,000 hits
14. Financ* OR sales or "market share" OR profit OR (annual w/5 report) OR volum* -- over 600,000 hits
15. FDA OR "Food and Drug" OR "Food & Drug" – third party
16. BANG AND ("I.Q." OR IQ)
17. BANG AND CoQ* -- redaction concerns relating to formula
18. BANG AND BCA* -- redaction concerns relating to formula
19. BANG AND (branch* w/50 chain* w/50 amino* w/50 acid*) -- redaction concerns relating to formula
20. BANG AND Alzheimer*

In addition to the objections above based on number of hits and proportionality, VPX is objecting to the following terms based on relevance, and it is VPX's position that these are no basis for these searches and review would be harrassing.

21. Calif*
22. RX w/50 (pharm* OR (drug w/3 co*) OR prescript*)
23. Lobby* w/50 (diet* OR drink* OR energ*)
24. "high school" w/50 science
25. Catherine w/3 Davis
26. BANG AND IFG-1
27. Pixie OR pixiedust* OR (Pix* w/3 dust*)
28. BANG AND Sarco*
29. BANG AND "satellite cell"
30. BANG AND retard*
31. Thermo*

**Objections: Privilege:**

In addition to those objections previously raised, VPX further objects to this term as seeking privileged information about other litigation with Thermlife.

1. Thermo*
------------

Regards, -MIKE

MICHAEL D. KANACH | Partner

**GORDON REES SCULLY MANSUKHANI  
YOUR 50 STATE PARTNER™**

275 Battery Street, Suite 2000  
San Francisco, CA 94111  
D: 415-875-3211 | P: 415-986-5900 | [mkanach@grsm.com](mailto:mkanach@grsm.com)

[www.grsm.com](http://www.grsm.com)  
[vCard](#) | [Bio](#) | [LinkedIn](#)

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**From:** Sourabh Mishra <[smishra@hueston.com](mailto:smishra@hueston.com)>  
**Sent:** Wednesday, August 28, 2019 12:32 PM  
**To:** Michael Kanach <[mkanach@grsm.com](mailto:mkanach@grsm.com)>  
**Cc:** Holly Heffner <[bheffner@grsm.com](mailto:bheffner@grsm.com)>; Steven N. Feldman <[sfeldman@hueston.com](mailto:sfeldman@hueston.com)>; Michael Todisco <[mtodisco@hueston.com](mailto:mtodisco@hueston.com)>  
**Subject:** [Monster/VPX] Meet and Confer re Search Terms

Michael,

As discussed yesterday, please find below: (1) the proposed search terms Monster is not objecting to reviewing (production is of course subject to Monster's stated objections in its RFP responses); (2) the proposed search terms that have a substantial number of hits or a large number of likely irrelevant hits, and so Monster requests that VPX narrow each search term; and (3) the proposed search terms that clearly touch upon privileged matters and thus are not properly asserted.

Please promptly send us your corresponding list. We are happy to meet and confer as soon as possible to attempt to resolve disagreements and agree upon a production schedule.

(1) **Agreed-Upon Search Terms**

Search Term
!Glutamine
!Leucine
\$500M
08-cv-01545
8,445,466
BANG!
BCAA!
CoQ10
Creatin!
Creaty!!
Good will OR Goodwill
Influencer!
Laitinen
Market share
McMahon
Owoc! Or Owok!
Planogram & (BANG or Mon! or MNST or Reign)
Shel! or cooler or retail! /s (space or steal)
Vital!
VPX!

(2) **Search Terms that Must be Narrowed**

Search Term	Objection
Adverse NEAR/5 affects or effects or events	Almost 300,000 results
Agreement!	Almost 200,000 results
Body NEAR/5 Fuel	Over 100,000 results
Caffeine	Search term is overbroad
Contract!	Almost 200,000 results
FDA	Search term is overbroad
Hanson OR HBC w/5 Vital OR VPX	Almost 500,000 results
Heart NEAR/5 attack or arrhythmia	Search term is overbroad
Monster NEAR/5 benefit!	Over 1.3 million results
Monster NEAR/5 health!	Almost 1.8 million results
Patent!	Search term is overbroad
Personal NEAR/5 injury	Almost 500,000 results

Pric! /3 Mon! or MNST or BANG or Reign	Over 2.0 million results
Pricing NEAR/3 model	Almost 300,000 results
Reign	Search term is overbroad
Sponsori	Over 100,000 results
Test or Tests or Testing	Over 100,000 results
Wrongful NEAR/5 death	Search term is overbroad

(3) **Search Terms that Clearly Request Privileged Information**

Miles & Redline
Shook & Redline

Regards,  
Sourabh

**Sourabh Mishra**

**HUESTON HENNIGAN LLP**

D: 949.356.5536  
T: 213.788.4340  
[smishra@hueston.com](mailto:smishra@hueston.com)

[Biography](#)

523 West 6th St Suite 400  
Los Angeles CA 90014

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**GORDON REES SCULLY MANSUKHANI, LLP**  
**YOUR 50 STATE PARTNER™**  
<http://www.grsm.com>

# EXHIBIT 5

1 M. D. SCULLY (SBN: 135853)  
mscully@grsm.com  
2 TIMOTHY K BRANSON (SBN: 187242)  
tbranson@grsm.com  
3 SEAN P. FLYNN (SBN: 220184)  
sflynn@grsm.com  
4 HOLLY L.K. HEFFNER (SBN: 245384)  
hheffner@grsm.com  
5 MICHAEL D. KANACH (SBN: 271215)  
mkanach@grsm.com  
6 PETER G. SIACHOS (*Pro Hac Vice*)  
psiachos@grsm.com  
7 GORDON REES SCULLY MANSUKHANI, LLP  
101 W Broadway, Suite 2000  
8 San Diego, CA 92101  
Phone: (619) 230-7441  
9 Fax: (619) 696-7124

10 Attorneys for Defendants  
VITAL PHARMACEUTICALS, INC., D/B/A VPX SPORTS, A FLORIDA  
11 CORPORATION; AND JOHN H. OWOC A.K.A. JACK OWOC, AN  
INDIVIDUAL

12  
13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15

16 MONSTER ENERGY COMPANY, a  
Delaware corporation,

17 Plaintiff,

18 vs.

19 VITAL PHARMACEUTICALS, INC.,  
d/b/a VPX SPORTS, a Florida  
20 corporation; and JOHN H. OWOC a.k.a.  
21 JACK OWOC, an individual,

22 Defendants.

23 CASE NO.: 18-cv-1882-JGB-SHK

24  
**DEFENDANT VITAL  
PHARMACEUTICALS, INC.,  
D/B/A VPX SPORTS'  
SUPPLEMENTAL RESPONSE TO  
PLAINTIFF MONSTER ENERGY  
COMPANY'S SPECIAL  
INTERROGATORIES, SETS ONE  
AND TWO**

25 Dist. Judge: Hon. Jesus G. Bernal  
26 Mag. Judge: Hon. Shashi H.  
Kewalramani

27 PROPOUNDING PARTY: Plaintiff, MONSTER ENERGY COMPANY

28 RESPONDING PARTY: Defendant, VITAL PHARMACEUTICALS INC.,  
D/B/A VPX SPROTS

SET NO.: ONE and TWO (Supplemental)

1

2

3           Defendant VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS  
4 (“Responding Party”) provides the following **SUPPLEMENTAL** responses to the  
5 Special Interrogatories, Sets ONE AND TWO, of Plaintiff MONSTER ENERGY  
6 COMPANY (“Propounding Party”), specifically Nos. 4, 6, 7, and 8, as follows:

7           1. These Interrogatories seek all documents and communications,  
8 including electronically stored information (“ESI”). The parties have begun to  
9 meet and confer to establish ESI/document production protocols, identify  
10 custodians, and propose search terms and date ranges. To facilitate this process,  
11 the parties have agreed to exchanged names of potential custodians on June 25,  
12 2019, along with dates of employment and a brief statement as to relevance;  
13 proposed search terms and date ranges on July 2, 2019; and have continued their  
14 meet and confer efforts through and including October 23, 2019. VPX has agreed  
15 to review more than 30 search terms for emails and attachments for more than a  
16 dozen custodians including current and former employees, including Dr. Liangxi  
17 Li, John Owoc, Paul Borrelli, Gene Bukovi, Meg Owoc, and Marc Kesten. VPX  
18 has been reviewing the documents with the agreed-to search terms, has begun to  
19 produce documents, has additional documents to be produced and has more in  
20 quality control review prior to production, and will continue to review and produce  
21 documents. The parties have agreed to continue their discussion regarding  
22 narrowing, scope, and burden. Responding Party reserves the right to further  
23 object to Interrogatories that are unduly burdensome or harassing or otherwise  
24 objectionable as discovery continues.

25           2. Discovery is ongoing. Responding Party’s responses to these  
26 Interrogatories are made to the best of its present knowledge, information, and  
27 belief. Said responses are at all times subject to additional or different information  
28 that discovery or further investigation may disclose and, while based on the present

1 state of Responding Party's recollection, are subject to refreshing of such  
2 recollection with such additional knowledge or facts that may result from further  
3 discovery or investigation. Responding Party reserves the right to make any use  
4 of, or to introduce at any hearing and at trial, information responsive to these  
5 Interrogatories that is discovered subsequent to the date of these responses,  
6 including, but not limited to, any information obtained and discovered herein.

7       3. Responding Party reserves all objections or other questions as to the  
8 confidentiality, relevance, materiality, privilege, or admissibility as evidence, in  
9 any subsequent proceeding or trial of this or any other action for any purpose  
10 whatsoever, of these responses and any documents or things identified in these  
11 responses.

12       4. Responding Party reserves the right to object on any ground at any  
13 time to such other or supplemental discovery as Propounding Party may propound  
14 involving or relating to the subject matter of these Interrogatories.

15       5. Responding Party objects to the extent these Interrogatories seek  
16 information protected by the attorney-client privilege and/or attorney work product  
17 privilege and/or other applicable privileged or protection. Such information shall  
18 not be provided in response. Any inadvertent disclosure thereof shall not be  
19 deemed a waiver.

20       6. Responding Party objects to the extent these Interrogatories seek to  
21 require Responding Party to identify persons, entities, or events not known on the  
22 grounds that such instructions, definitions, or Interrogatories are overbroad and  
23 seek to require more of Responding Party than any obligation imposed by law,  
24 subject Responding Party to unreasonable and undue annoyance, oppression,  
25 burden, and expense, and seek to impose upon Responding Party an obligation to  
26 investigate and discover information and materials from third parties or sources  
27 that are equally accessible to Propounding Party such as, for example and without  
28 limitation, research, articles, press releases, blogs, social media posts or comments,

1 product reviews, and publicly available websites.

2       7. Responding Party objects to the definition of “BANG” as vague,  
3 ambiguous, overbroad, and harassing. Propounding Party defines BANG in these  
4 Interrogatories as “the Bang Energy line of energy drink products.” Yet,  
5 Propounding Party’s First Amended Complaint (ECF 61, “FAC”) defines “BANG”  
6 both more broadly and more narrowly than as defined in the Interrogatories.  
7 Paragraphs 44, 56, 68, for example, explicitly limit Propounding Party’s claims to  
8 products with certain images of products and certain words on the package, such as  
9 those cans that contain the words “Super Creatine” (*e.g.*, Paragraph 44; *see also*,  
10 Paragraphs 3, 4, 45-56), or containing United States Patent Number 8,445,466  
11 (*e.g.*, Paragraphs 60-62, 68), or containing certain advertised ingredients on the  
12 label (*e.g.*, Paragraph 56: “Each can of BANG states: ‘Power up with BANG’s  
13 potent brain & body-rocking fuel: Creatine, Caffeine, CoQ10 & BCAAs.’”; *see*  
14 *also*, Paragraph 84). Propounding Party further uses an inconsistently broad  
15 definition in footnote 1 of the FAC:

16       VPX began selling BANG to consumers in 2012. VPX currently  
17 produces and sells over a dozen flavors of BANG, including caffeine-  
18 free flavors.

19       Accordingly, for all Interrogatories that seek documents or communications  
20 related to BANG®, Responding Party requests a time to meet and confer to  
21 consistently define and narrow the Request.

22       Monster’s Requests for Admission set one, dated October 1, 2019, defined  
23 the scope of relevant products to a specific list of products, “the Bang Energy line  
24 of ready-to-drink 16 oz. energy drink products...,” and excluded from the  
25 definition other products as follows: “BANG does not include ‘Bang Keto Coffee,’  
26 ‘Bang Master Blaster,’ ‘Bang Shots,’ ‘Bang ThermIQ,’ formulations of Bang  
27 produced for consumption outside of the United States, or any other Bang-branded  
28 product materially different from the line of products featured in the above

1 | photograph.”

2       8. Responding Party further objects to the definition of “SUPER  
3 CREATINE” as “the ‘stable aqueous compositions comprising amide-protected  
4 creatine species’ identified in the ’466 PATENT” from Propounding Party’s first  
5 set of Interrogatories as vague and ambiguous and not consistent with Propounding  
6 Party’s use of the term in the FAC (*e.g.*, Paragraph 44; *see also*, Paragraphs 3, 4,  
7 45-56). Responding Party further objects that the term SUPER CREATINE is  
8 referenced in this second set of Interrogatories, but not defined.

9        9. Responding Party further objects to the definition of “VITALS” as  
10 vague and ambiguous. Propounding Party defines “VITALS” as “includes body  
11 temperature, blood pressure, heart rate, and respiratory rate.” Responding Party  
12 objects to the word “includes” in the definition as ambiguously broad and  
13 undefined as to scope. It is unclear what is and is not included in the definition for  
14 VITALS as defined by Propounding Party. *See* Interrogatory No. 7.

15        10. Responding Party further objects to the definition of  
16        “SUBSTANCES” as vague and ambiguous. Propounding Party defines  
17        “SUBSTANCES” as “all substances naturally produced by the human body,  
18        including creatine and creatinine.” Responding Party objects to the phrases “all  
19        substances” and “including” as ambiguously broad and undefined as to scope. It is  
20        unclear what is and is not included in the definition for SUBSTANCES as defined  
21        by Propounding Party, and it is unclear if the specific substances, such as creatine  
22        or creatinine, that are naturally produced by the human body are included or not  
23        within the Interrogatory as the term is used. *See* Interrogatory No. 7.

## SPECIFIC RESPONSES

## **TO SPECIAL INTERROGATORIES**

Without waiving or rebutting in any manner any of the foregoing general objections, but rather incorporating them into each of the following responses to the extent applicable, Responding Party responds to Propounding Party's special

1 interrogatories as follows:

2                   **RESPONSES TO SPECIAL INTERROGATORIES**

3                   **SPECIAL INTERROGATORY NO. 1:**

4                   State the formula for YOUR BANG energy drink, including the amount  
5 used of each ingredient. To the extent the formula is different for each flavor of  
6 BANG, state the formula for each flavor.

7                   **RESPONSE TO INTERROGATORY NO. 1:**

8                   Responding Party objects to this Interrogatory to the extent it seeks  
9 privileged attorney client communications or work product. Responding Party  
10 further objects to this Interrogatory on the basis that it seeks information that is  
11 confidential and proprietary in nature and, as such, will not be produced until a  
12 Protective Order is in place. Responding Party objects to this Interrogatory as  
13 seeking proprietary information regarding trade secrets, including ingredients,  
14 recipes, formulations, formulae, which would be extremely detrimental to  
15 Defendant if disseminated or distributed publicly or if provided to Responding  
16 Party's competitors or potential competitors. Responding Party further objects to  
17 this Interrogatory as vague as to scope and time and seeking irrelevant information  
18 and documents. Responding Party further objects to this Interrogatory as unduly  
19 burdensome, harassing, and not proportional to the needs of this case under Rule  
20 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous  
21 as to the scope and time. Responding Party objects to the definition of "BANG" as  
22 vague, ambiguous, overbroad, and harassing. Defendant objects to this  
23 Interrogatory as vague and ambiguous with respect to the undefined terms  
24 "formula," "amount," "ingredient," and "flavor." Responding Party further objects  
25 to this Interrogatory to the extent this Interrogatory seeks information subject to  
26 expert analysis or opinion. To the extent information will be analyzed by an  
27 expert, such information may be provided in an expert's report as set forth  
28 according to the Court's schedule. Further, this Interrogatory appears to be

1 duplicative of document requests, including specifically request no. 4 which seeks  
2 “All DOCUMENTS and COMMUNICATIONS relating to YOUR studies,  
3 research, and tests of BANG products, including but not limited to:

- 4 a. The amount of creatine in BANG products;
- 5 b. The amount of SUPER CREATINE in BANG products;
- 6 c. The amount of creatine in SUPER CREATINE;
- 7 d. The incremental effect of including additional SUPER CREATINE in  
8 BANG products;
- 9 e. The contents of BANG products;
- 10 f. Comparisons between BANG products and products manufactured or  
11 sold by MONSTER;
- 12 g. The health impacts of creatyl-L-leucine; and
- 13 h. Discussions or analyses relating to creatinine.”

14 Further, this Interrogatory is duplicative of request no. 50 which seeks “All  
15 DOCUMENTS and COMMUNICATIONS relating to the formulation or changes  
16 to the formulation of BANG products.” Responding Party incorporates by  
17 reference all objections made in response to Request for Documents, including but  
18 not limited to Nos. 4 and 50.

19 Subject to the foregoing general and specific objections, Defendant responds  
20 as follows:

21 It is undisputed that certain BANG products contain a form of creatine  
22 called Super Creatine, or creatyl-L-leucine, which combines creatine and an amino  
23 acid L-leucine, as alleged by Monster and allegedly proven by tests performed by  
24 Monster’s expert, Dr. Neil Spingarn. Creatyl-L-leucine in certain BANG products  
25 is branded under the trademark SUPER CREATINE. Responding Party also  
26 incorporates by reference the declaration by Dr. Li in support of Defendants’  
27 Opposition to Monster’s Motion for a Preliminary Injunction (ECF 100 and  
28 exhibits 100-1 through 100-3). Responding Party will not produce its proprietary

1 and trade secret formulas to a competitor, Monster, who just introduced a knock-  
2 out drink, REIGN, to compete against Responding Party's BANG® energy drink.  
3 Responding Party may supplement this response to provide certain, redacted  
4 information sought by this Interrogatory that is relevant to the question of Creatyl-  
5 L-Leucine in certain BANG® drinks, but Responding Party will not produce its  
6 proprietary formulas and lists of amounts for all ingredients in all BANG® drinks.  
7 Responding Party further objects to the extent the relevant information sought by  
8 this Interrogatory is duplicative of other Interrogatories (e.g., No. 2) and requests  
9 for production of documents. Pursuant to Federal Rule of Civil Procedure 33(d),  
10 Defendant reserves the right to produce business records in this action from which  
11 the answer to the reasonable scope of this Interrogatory may be ascertained. The  
12 answer to this Interrogatory may be determined by examining, auditing, compiling,  
13 abstracting, or summarizing Responding Party business records (including  
14 electronically stored information), and the burden of deriving or ascertaining the  
15 answer will be substantially the same for either party. Responding Party will meet  
16 and confer with Propounding Party to narrow the scope of this Request so that the  
17 non-privileged information in Responding Party's possession, custody, or control  
18 sufficient to respond to this Request is proportionate to the needs of this case and  
19 will be produced subject to a Protective Order. Specifically, Responding Party will  
20 continue to meet and confer with Propounding Party regarding ESI protocols,  
21 custodians, search terms, and date ranges.

22 **SUPPLEMENTAL RESPONSE TO SPECIAL INTERROGATORY NO. 1:**

23 VPX maintains the foregoing and previously asserted general and special  
24 objections and supplements its response in light of meet and confer efforts to  
25 resolve the discovery dispute between the parties, as follows:

26 Statements that BANG contains creatine are true statements. Plaintiff  
27 moved to compel further response to this Interrogatory No. 1, and VPX has agreed  
28 to disclose the quantity of that ingredient as well as caffeine. In order to resolve

1 discovery disputes during the discovery process in this case, VPX has disclosed  
2 through meet and confer efforts that the quantity of creatyl-l-leucine in a can of  
3 BANG® ready to drink cans of BANG® energy drinks with the reference to  
4 SUPER CREATINE® is less than 40 mg and caffeine is 300 mg. VPX maintains  
5 that its formula and the quantity of creatyl-l-leucine is proprietary and a valuable  
6 trade secret which Monster seeks for competitive reasons because VPX's BANG  
7 product is so successful that Monster introduced an almost identical product called  
8 REIGN with almost identical packaging, formula, and branding, which specifically  
9 targets and is directed to VPX's customers. VPX discloses the amount of caffeine  
10 on the can label, which Monster recently copied in its knock-off REIGN product  
11 which also has 300 mg of caffeine. VPX maintains its objections to the formula  
12 being unnecessary as stated in VPX's motions and objections filed with the Court  
13 which objections are incorporated herein.

14 As stated in response to Interrogatory No. 2, creatyl-l-leucine is a bond of  
15 creatine and leucine. It is undisputed that many forms of creatine exist in the  
16 marketplace, including formulations combining creatine with amino acids. It is  
17 also undisputed that certain BANG products contain a form of creatine called  
18 creatyl-L-leucine, which combines creatine with the amino acid L-leucine, as  
19 alleged by Monster and allegedly proven by tests performed by Monster's expert,  
20 Dr. Neil Spingarn. Creatyl-L-leucine in certain BANG products is branded under  
21 the trademark SUPER CREATINE.

22 See also Court order denying Monster's Motion for a Preliminary Injunction  
23 and related briefing, including those citations in the Order, excerpted below:

24 It appears, however, that Monster's claims rely on an overly narrow  
25 understanding of the word "creatine," since, as discussed in their own  
26 evidentiary submissions, "[m]any forms of creatine exist in the  
27 marketplace," including formulations combining creatine with other  
28 amino acids. Thomas W. Buford, et al., International Society of Sports  
Nutrition position stand: creatine supplementation and exercise, J. Int.

1 Soc. Sports. Nutr., Aug. 2007; see also Robert Cooper, et al., Creatine  
2 supplementation with specific view to exercise/sports performance: an  
3 update, J. Int. Soc. Sports. Nutr., July 2012. The parties agree that  
4 “Super Creatine” is a dipeptide – a chemical composed of two amino  
5 acids – which consists of the amino acids creatine and L-leucine.  
6 (“Declaration of Dr. Liangxi Li,” Dkt. No. 100 ¶ 24; Spingarn Decl. ¶  
7 13.) Defendants have submitted the declaration of Dr. Liangxi Li,  
8 Research & Development Manager at VPX, which details the many  
9 forms of creatine compound which are available on the market, many  
10 of which consist of creatine bonded with other molecules, and describes  
11 the process of developing Super Creatine by joining creatine to other  
12 amino acids. (“Declaration of Dr. Liangxi Li,” Dkt. No. 100 ¶¶ 13-16,  
13 21.) Li states that the purpose of joining the creatine and L-leucine  
14 amino acids was to create a form of creatine which is “more stable and  
15 more bioavailable than other forms of creatine.” (Li Decl. ¶ 35.)

16 ECF 122, page 6.

17 **SPECIAL INTERROGATORY NO. 2:**

18 If YOU contend that BANG contains creatine, state all bases for YOUR  
19 contention.

20 **RESPONSE TO INTERROGATORY NO. 2:**

21 Responding Party objects to the extent this Interrogatory is duplicative of  
22 Interrogatory No. 1. Responding Party objects to this Interrogatory to the extent it  
23 seeks privileged attorney client communications or work product. Responding  
24 Party further objects to this Interrogatory on the basis that it seeks information that  
25 is confidential and proprietary in nature and, as such, will not be produced until a  
26 Protective Order is in place. Responding Party objects to this Interrogatory as  
27 seeking proprietary information regarding trade secrets, including ingredients,  
28 recipes, formulations, formulae, which would be extremely detrimental to  
Defendant if disseminated or distributed publicly or if provided to Responding  
Party’s competitors or potential competitors. Responding Party further objects to  
this Interrogatory as vague as to scope and time and seeking irrelevant information  
and documents. Responding Party further objects to this Interrogatory as unduly

1 burdensome, harassing, and not proportional to the needs of this case under Rule  
2 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous  
3 as to the scope and time. Responding Party objects to the definition of “BANG” as  
4 vague, ambiguous, overbroad, and harassing. Defendant objects to this  
5 Interrogatory as vague and ambiguous with respect to the undefined terms  
6 “contains” and “creatine.” Responding Party further objects to this Interrogatory  
7 to the extent this Interrogatory seeks information subject to expert analysis or  
8 opinion. To the extent information will be analyzed by an expert, such information  
9 may be provided in an expert’s report as set forth according to the Court’s  
10 schedule. Further, this Interrogatory appears to be duplicative of document  
11 requests, including specifically request no. 4 which seeks “All DOCUMENTS and  
12 COMMUNICATIONS relating to YOUR studies, research, and tests of BANG  
13 products, including but not limited to:

- 14       a.     The amount of creatine in BANG products;
- 15       b.     The amount of SUPER CREATINE in BANG products;
- 16       c.     The amount of creatine in SUPER CREATINE;
- 17       d.     The incremental effect of including additional SUPER CREATINE in  
18              BANG products;
- 19       e.     The contents of BANG products;
- 20       f.     Comparisons between BANG products and products manufactured or  
21              sold by MONSTER;
- 22       g.     The health impacts of creatyl-L-leucine; and
- 23       h.     Discussions or analyses relating to creatinine.”

24       Further, this Interrogatory is duplicative of request no. 50 which seeks “All  
25 DOCUMENTS and COMMUNICATIONS relating to the formulation or changes  
26 to the formulation of BANG products.” Responding Party incorporates by  
27 reference all objections made in response to Request for Documents, including but  
28 not limited to Nos. 4 and 50. Responding Party further objects to this Interrogatory

1 as seeking information that calls for a legal conclusion.

2 Subject to the foregoing general and specific objections, Defendant responds  
3 as follows:

4 It is undisputed that many forms of creatine exist in the marketplace,  
5 including formulations combining creatine with amino acids. It is also undisputed  
6 that certain BANG products contain a form of creatine called creatyl-L-leucine,  
7 which combines creatine with the amino acid L-leucine, as alleged by Monster and  
8 allegedly proven by tests performed by Monster's expert, Dr. Neil Spingarn.  
9 Creatyl-L-leucine in certain BANG products is branded under the trademark  
10 SUPER CREATINE. Responding Party also incorporates by reference the  
11 declaration by Dr. Li in support of Defendants' Opposition to Monster's Motion  
12 for a Preliminary Injunction (ECF 100 and exhibits 100-1 through 100-3).  
13 Responding Party also incorporates by reference exhibits to the Declaration of  
14 Steven Feldman in support of Monster's Motion for a Preliminary Injunction (ECF  
15 69, Exhibits 24 and 25, Thomas W. Buford, et al., International Society of Sports  
16 Nutrition position stand: creatine supplementation and exercise, J. Int. Soc. Sports.  
17 Nutr., Aug. 2007; see also Robert Cooper, et al., Creatine supplementation with  
18 specific view to exercise/sports performance: an update, J. Int. Soc. Sports. Nutr.,  
19 July 2012, respectively).

20 This Interrogatory appears to seek expert testimony, which is improper prior  
21 to the deadline for expert reports. Expert reports and testimony will be served  
22 according to the Federal Rules and the Court's schedule. This Interrogatory  
23 appears to seek documents from third parties: "all bases for YOUR contention."  
24 Propounding Party will not produce "all" bases or DOCUMENTS in response to  
25 this Interrogatory. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant  
26 reserves the right to produce business records in this action from which the answer  
27 to the reasonable scope of this Interrogatory may be ascertained. The answer to this  
28 Interrogatory may be determined by examining, auditing, compiling, abstracting,

1 or summarizing Responding Party business records (including electronically stored  
2 information), and the burden of deriving or ascertaining the answer will be  
3 substantially the same for either party. Responding Party will meet and confer  
4 with Propounding Party to narrow the scope of this Request so that the non-  
5 privileged information in Responding Party's possession, custody, or control  
6 sufficient to respond to this Request is proportionate to the needs of this case and  
7 will be produced subject to a Protective Order. Specifically, Responding Party will  
8 continue to meet and confer with Propounding Party regarding ESI protocols,  
9 custodians, search terms, and date ranges.

10 **SUPPLEMENTAL RESPONSE TO SPECIAL INTERROGATORY NO. 2:**

11 VPX maintains the foregoing and previously asserted general and special  
12 objections and supplements its response in light of meet and confer efforts to  
13 resolve the discovery dispute between the parties, as follows:

14 Statements that BANG contains creatine are true statements. Plaintiff  
15 moved to compel further response to Interrogatory No. 1, and VPX has agreed to  
16 disclose the quantity of that ingredient, creatyl-l-leucine, as well as the quantity of  
17 caffeine. In order to resolve discovery disputes during the discovery process in  
18 this case, VPX has disclosed through meet and confer efforts that the quantity of  
19 creatyl-l-leucine in a can of BANG® ready to drink cans of BANG® energy drinks  
20 with the reference to SUPER CREATINE® is less than 40 mg and caffeine is 300  
21 mg. VPX maintains that its formula and the quantity of creatyl-l-leucine is  
22 proprietary and a valuable trade secret which Monster seeks for competitive  
23 reasons because VPX's BANG product is so successful that Monster introduced an  
24 almost identical product called REIGN with almost identical packaging, formula,  
25 and branding, which specifically targets and is directed to VPX's customers. VPX  
26 discloses the amount of caffeine on the can label, which Monster recently copied in  
27 its knock-off REIGN product which also has 300 mg of caffeine. VPX maintains  
28 its objections to the formula being unnecessary as stated in VPX's motions and

1 objections filed with the Court which objections are incorporated herein. As stated  
2 in the original response above, creatyl-l-leucine is a bond of creatine and leucine. It  
3 is undisputed that many forms of creatine exist in the marketplace, including  
4 formulations combining creatine with amino acids. It is also undisputed that  
5 certain BANG products contain a form of creatine called creatyl-L-leucine, which  
6 combines creatine with the amino acid L-leucine, as alleged by Monster and  
7 allegedly proven by tests performed by Monster's expert, Dr. Neil Spingarn.  
8 Creatyl-L-leucine in certain BANG products is branded under the trademark  
9 **SUPER CREATINE.**

10 See also Court order denying Monster's Motion for a Preliminary Injunction  
11 and related briefing, including those citations in the Order, excerpted below:

12 It appears, however, that Monster's claims rely on an overly narrow  
13 understanding of the word "creatine," since, as discussed in their own  
14 evidentiary submissions, "[m]any forms of creatine exist in the  
15 marketplace," including formulations combining creatine with other  
16 amino acids. Thomas W. Buford, et al., International Society of Sports  
17 Nutrition position stand: creatine supplementation and exercise, J. Int.  
18 Soc. Sports. Nutr., Aug. 2007; see also Robert Cooper, et al., Creatine  
19 supplementation with specific view to exercise/sports performance: an  
20 update, J. Int. Soc. Sports. Nutr., July 2012. The parties agree that  
21 "Super Creatine" is a dipeptide – a chemical composed of two amino  
22 acids – which consists of the amino acids creatine and L-leucine.  
23 ("Declaration of Dr. Liangxi Li," Dkt. No. 100 ¶ 24; Spingarn Decl. ¶  
24 13.) Defendants have submitted the declaration of Dr. Liangxi Li,  
25 Research & Development Manager at VPX, which details the many  
26 forms of creatine compound which are available on the market, many  
27 of which consist of creatine bonded with other molecules, and describes  
28 the process of developing Super Creatine by joining creatine to other  
amino acids. ("Declaration of Dr. Liangxi Li," Dkt. No. 100 ¶¶ 13-16,  
21.) Li states that the purpose of joining the creatine and L-leucine  
amino acids was to create a form of creatine which is "more stable and  
more bioavailable than other forms of creatine." (Li Decl. ¶ 35.)

ECF 122, page 6.

Gordon Rees Scully Mansukhani, LLP  
101 West Broadway, Suite 2000  
San Diego, CA 92101

1     **SPECIAL INTERROGATORY NO. 4:**

2              If YOU contend that the “Super Creatine” in BANG creates positive health  
3 effects for drinkers, identify all publications, research papers, and DOCUMENTS  
4 supporting YOUR claim, and how that source supports YOUR claim that the  
5 “Super Creatine” in BANG creates positive health effects for drinkers.

6     **RESPONSE TO INTERROGATORY NO. 4:**

7              Responding Party objects to this Interrogatory to the extent it seeks  
8 privileged attorney client communications or work product. Responding Party  
9 further objects to this Interrogatory on the basis that it seeks information that is  
10 confidential and proprietary in nature and, as such, will not be produced until a  
11 Protective Order is in place. Responding Party objects to this Interrogatory as  
12 seeking proprietary information regarding trade secrets, including ingredients,  
13 recipes, formulations, formulae, which would be extremely detrimental to  
14 Defendant if disseminated or distributed publicly or if provided to Responding  
15 Party’s competitors or potential competitors. Responding Party further objects to  
16 this Interrogatory as vague as to scope and time and seeking irrelevant information  
17 and documents. Responding Party further objects to this Interrogatory as unduly  
18 burdensome, harassing, and not proportional to the needs of this case under Rule  
19 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous  
20 as to the scope and time. Responding Party objects to the definitions of “BANG”  
21 and “SUPER CREATINE” as vague, ambiguous, overbroad, and harassing.  
22 Defendant objects to this Interrogatory as vague and ambiguous with respect to the  
23 undefined terms “supporting,” “YOUR claim,” “positive health effects,” “health  
24 effects.” Responding Party further objects to this Interrogatory to the extent this  
25 Interrogatory seeks information subject to expert analysis or opinion. To the extent  
26 information will be analyzed by an expert, such information may be provided in an  
27 expert’s report as set forth according to the Court’s schedule. Further, this  
28 Interrogatory appears to be duplicative of document requests, including

1 specifically request no. 4 which seeks “All DOCUMENTS and  
2 COMMUNICATIONS relating to YOUR studies, research, and tests of BANG  
3 products, including but not limited to:

- 4 a. The amount of creatine in BANG products;
- 5 b. The amount of SUPER CREATINE in BANG products;
- 6 c. The amount of creatine in SUPER CREATINE;
- 7 d. The incremental effect of including additional SUPER CREATINE in  
8 BANG products;
- 9 e. The contents of BANG products;
- 10 f. Comparisons between BANG products and products manufactured or  
11 sold by MONSTER;
- 12 g. The health impacts of creatyl-L-leucine; and
- 13 h. Discussions or analyses relating to creatinine.”

14 Further, this Interrogatory is duplicative of request no. 50 which seeks “All  
15 DOCUMENTS and COMMUNICATIONS relating to the formulation or changes  
16 to the formulation of BANG products.” Responding Party incorporates by  
17 reference all objections made in response to Request for Documents, including but  
18 not limited to Nos. 4, 36, 37, 48, and 50. Responding Party further objects to the  
19 extent this request seeks information from third-parties. Responding Party further  
20 objects to this Interrogatory as seeking information that calls for a legal conclusion.

21 Subject to the foregoing general and specific objections, Defendant responds  
22 as follows:

23 Even though Responding Party is responding to this Interrogatory,  
24 Responding Party does not have the burden of proof as to the topic raised in this  
25 Interrogatory. *See e.g.*, Order Denying Monster’s Motion for a Preliminary  
26 Injunction, dated June 6, 2019, ECF 122, page 6. For example, Propounding Party  
27 has the burden of demonstrating that Creatyl-L-Leucine does not provide the  
28 benefits of creatine. This Interrogatory appears to seek expert testimony, which is

1      improper prior to the deadline for expert reports. Expert reports and testimony will  
2      be served according to the Federal Rules and the Court's schedule. Responding  
3      Party reserves the right to provide a rebuttal to Propounding Party's position after  
4      Propounding Party provides its position, evidence, expert reports, or testimony.  
5      Responding Party incorporates by reference the declaration by Dr. Li in support of  
6      Defendants' Opposition to Monster's Motion for Preliminary Injunction, including  
7      Exhibit L3 (ECF 100 and exhibits 100-1 through 100-3). Exhibit L3 to Dr. Li's  
8      Declaration is a true and correct copy of the poster presentation for this latest study  
9      of BANG®. VPX sponsored a double-blind, placebo-controlled, crossover trial  
10     study of BANG®, performed by Nova Southeastern University, entitled "The  
11     Effects of BANG® Energy on Psychomotor Vigilance," by Christopher Horn,  
12     Madaline Kenyon, Cassandra Carson, Anya Ellerbrock, Lia Jiannine, Tobin Silver,  
13     Corey Peacock, Jaime Tartar, and Jose Antonio. In conclusion, the BANG®  
14     energy drink resulted in a significantly lower (i.e., faster) ( $p < 0.05$ ) psychomotor  
15     vigilance mean reaction time versus the placebo as well as fewer lapses. Creatyl-L-  
16     leucine in certain BANG products is branded under the trademark SUPER  
17     CREATINE.

18            This Interrogatory specifically seeks documents from third parties: "all  
19     publications, research papers, and DOCUMENTS supporting YOUR claim."  
20     Propounding Party will not produce "all" DOCUMENTS in response to this  
21     Interrogatory. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant  
22     reserves the right to produce business records in this action from which the answer  
23     to the reasonable scope of this Interrogatory may be ascertained. The answer to this  
24     Interrogatory may be determined by examining, auditing, compiling, abstracting,  
25     or summarizing Responding Party business records (including electronically stored  
26     information), and the burden of deriving or ascertaining the answer will be  
27     substantially the same for either party. Responding Party will meet and confer  
28     with Propounding Party to narrow the scope of this Request so that the non-

1 privileged information in Responding Party's possession, custody, or control  
2 sufficient to respond to this Request is proportionate to the needs of this case and  
3 will be produced subject to a Protective Order. Specifically, Responding Party will  
4 continue to meet and confer with Propounding Party regarding ESI protocols,  
5 custodians, search terms, and date ranges.

6 **SUPPLEMENTAL RESPONSE TO SPECIAL INTERROGATORY NO. 4:**

7 VPX maintains the foregoing and previously asserted general and special  
8 objections and supplements its response in light of meet and confer efforts to  
9 resolve the discovery dispute between the parties, as follows:

10 The Parties have met and conferred as to email search terms and protocols  
11 and have agreed to review certain documents which appear targeted at this request  
12 and may be responsive to this Interrogatory, such as studies, etc. VPX is reviewing  
13 numerous documents and will supplement its rolling production and may  
14 supplement this Interrogatory if additional information is discovered. VPX  
15 maintains that Monster has the burden of proving all elements of each of the  
16 asserted causes of action. Monster has not done so. During meet and confer  
17 correspondence relating to this Interrogatory, while this Interrogatory does not seek  
18 information regarding *the quantity* of creatyl-l-leucine in BANG energy drinks,  
19 Monster claimed that the information regarding the quantity of creatyl-l-leucine  
20 and these interrogatories were relevant to claims 1-3 of the First Amended  
21 Complaint (FAC), which relate to claims of false advertising, specifically related to  
22 alleged statements made to consumers upon which those consumers would rely. In  
23 response to Paragraph 51 of the FAC, VPX responded that "Defendants admit  
24 Owoc has been asked on social media how much Super Creatine is in BANG® and  
25 that such is proprietary information." Monster does not dispute that the BANG  
26 formula is a trade secret; in fact, Monster claims that its own formulas (e.g.,  
27 REIGN) are trade secrets and such disclosure would harm the owner of the formula  
28 if such information was in the hands of a competitor. Monster does not allege that

1 VPX has ever disclosed the formula for BANG or that any consumer has ever  
2 relied on any statements from VPX relating to the formula or quantities of  
3 ingredients, other than 300 mg of caffeine, in BANG. VPX maintains that its  
4 formula and the quantity of creatyl-l-leucine is proprietary and a valuable trade  
5 secret which Monster seeks for competitive reasons because VPX's BANG  
6 product is so successful that Monster introduced an almost identical product called  
7 REIGN with almost identical packaging, formula, and branding, which specifically  
8 targets and is directed to VPX's customers. In order to resolve discovery disputes  
9 during the discovery process in this case, VPX has disclosed through meet and  
10 confer efforts that the quantity of creatyl-l-leucine in a can of BANG® ready to  
11 drink cans of BANG® energy drinks with the reference to SUPER CREATINE® is  
12 less than 40 mg and caffeine is 300 mg. VPX has not disclosed the quantities of  
13 the other ingredients in BANG. VPX has not previously disclosed the quantity of  
14 creatyl-l-leucine in advertising or on the labels of its cans of BANG®, nor has VPX  
15 ever stated that there were more than 40 mg of creatyl-l-leucine in BANG® ready  
16 to drink cans. No competitors of VPX sell an energy drink with more creatyl-l-  
17 leucine than BANG. No consumers seeking a specific quantity of creatine in any  
18 form have been told by VPX how much creatyl-l-leucine is in the proprietary blend  
19 of BANG. Thus, no consumers could reasonably rely on such statements in  
20 advertisements (as VPX has not made those statements). In addition, no false  
21 statements of fact were made about the quantities of ingredients or their impact on  
22 consumers for this product, no consumer could have relied on or did rely on such  
23 statements, no statements deceived consumers or were likely to deceive  
24 consumers, and no alleged "deception" (as Monster alleges) was or would be  
25 material to a consumer. Further, Monster could not have been harmed by any  
26 statements relating to creatyl-l-leucine related to the BANG energy drink. As set  
27 forth through Dr. Li's Declaration and the patent, to VPX's knowledge, VPX is the  
28 first to use creatyl-l-leucine in an energy drink. To date, VPX is not aware of any

1 competitors who have sold an energy drink containing creatyl-l-leucine. Upon  
2 information and belief, Monster has never made and does not sell an energy drink  
3 with creatyl-l-leucine or other form of creatine, even creatine monohydrate. *See*  
4 Monster Response to Request for Admission (“RFA”) Nos. 1-6 (RFA No. 1:  
5 “...Monster admits that it has never released an energy drink product with Monster  
6 branding that contains creatine.”; RFA No. 2: “Monster admits that it has never  
7 released an energy drink product with Monster branding that contains creatyl-L-  
8 leucine.”

9       Creatine supplements come in many forms in the marketplace and such  
10 supplements have been scientifically proven to provide positive health effects,  
11 including building muscle and strength and boosting athletic performance, and  
12 research has also shown that creatine supplements have the potential for helping  
13 with age-related neurological diseases, such as improving brain function and  
14 boosting memory. Dr. Li cites to some studies in his Declaration, other studies are  
15 available publicly, and studies that are responsive to Monster’s proposed email  
16 search terms that are agreed upon by the parties will be reviewed and responsive,  
17 non-privileged documents will be produced. Further, there is no dispute that  
18 studies show that exercise, a healthy lifestyle, and low carbohydrate and low sugar  
19 diets can provide benefits (unlike many of Monster’s energy drinks) can provide  
20 health benefits and new articles and studies come out all the time. See, e.g., an  
21 article dated today, October 30, 2019, in the Wall Street Journal, titled “The Link  
22 Between Diet, Exercise and Alzheimer’s - A new study finds that lifestyle changes  
23 can improve cognition.” <https://www.wsj.com/articles/the-link-between-diet-exercise-and-alzheimers-11572427802>. That article cites to a study released on  
24 October 30, 2019.

25       The creatyl-l-leucine in a 16 oz. can of a BANG® energy drink is not  
26 intended to be a sole source of creatine and does not advertise that it is, but rather  
27 is a great tasting drink to add to a well-balanced diet that includes the consumption

1 of other foods containing creatine, such as beef, chicken, pork, eggs, and  
2 fish. Further, Bang as a complete product with zero sugars and zero calories is a  
3 healthier option than most energy drinks manufactured by its competitors,  
4 including Monster, which contain large quantities of sugar, carbohydrates, and  
5 other more harmful ingredients. And, in addition to creatyl-l-leucine (Super  
6 Creatine), Bang contains many ingredients that have been characterized as  
7 providing positive health benefits, including caffeine, vitamins, electrolytes,  
8 CoQ10 and amino acids. In fact, as referenced above, a recent peer-reviewed  
9 double blind study of Bang RTD demonstrated that the BANG® energy drink  
10 resulted in a significantly lower (i.e., faster) ( $p < 0.05$ ) psychomotor vigilance mean  
11 reaction time versus the placebo as well as fewer lapses.

12 VPX is not aware of any contentions VPX has made in this case or publicly  
13 about the quantity of the creatyl-l-leucine (Super Creatine) in a 16 oz. can of a  
14 BANG® energy drink or that the quantity of the creatyl-l-leucine (Super Creatine)  
15 in a 16-oz can creates “positive health effects for drinkers” as phrased in this  
16 Interrogatory, except as compared to other energy drinks offered by  
17 competitors. In fact, Monster introduced a similar product called REIGN in order  
18 to compete with VPX in a category of drinks third parties call the performance  
19 energy category. *See e.g.*, Monster’s Motion for a Preliminary Injunction Exhibit C  
20 and D to Emilie Tirre’s Declaration in support of Monster’s Motion, ECF 67-6.  
21 Below is an excerpt from Exhibit C, page 24 of 27, showing Reign’s description of  
22  
23  
24  
25  
26  
27  
28

1 ingredients mirroring BANG's description.

	Reign
3	All Natural Flavors Yes
4	Zero Calories Yes
5	Zero Sugar Yes
6	No Artificial Colors Yes
7	300 MG Caffeine Yes
8	Electrolytes Yes
9	BCAA's Yes
10	CO Q10 Yes

11 Further in Exhibit D to Tirre's Declaration, Monster cites to a report from  
12 Guggenheim which claims that "Monster has one of the most attractive long-term  
13 growth algorithms in our Food and Beverage coverage as we expect organic sales  
14 and EPS CAGR of 10% and 14%, respectively. The sustainable growth outlook is  
15 supported by ... 3) innovation in energy-adjacent segments such as coffee and  
16 "performance energy" with REIGN..."

17 Monster's counsel stated during meet and confer correspondence that certain  
18 paragraphs of the First Amended Complaint were the basis of Monster's  
19 Interrogatories Nos. 4, 7, and 8, specifically paragraphs 46 to 48 of the First  
20 Amended Complaint ("FAC"). Paragraphs 46-48 of the FAC, however, do not  
21 provide any context for where those statements come from, none of these alleged  
22 statements are full quotes, and Monster provided no citations to where these  
23 statements were made. As such, it does not appear from the quoted language or the  
24 descriptions made by Monster in Paragraphs 46 to 48 that these statements are  
25 about any specific health effects of creatyl-l-leucine in a can of BANG ready to  
26 drink energy drinks or related to the quantity of creatyl-l-leucine in a can. Monster  
27 does not allege that these statements were made in public, to consumers, or in  
28 advertisements. The fact that those statements are not in quotes indicates that the  
statements are taken out of context and that none of them are about Super Creatine  
when considered in context. Further, as stated in the prior objections, there is no

1 evidence from Monster or its experts that any of these statements are false. VPX  
2 has already addressed and denied many of these statements in a post on its website:  
3 <https://bang-energy.com/blog/ca-based-monster-energy-file-third-frivolous-lawsuit-against-vpx/>, including the following statement by Jack Owoc addressing  
4 numerous false allegations in Monster's Complaint: "I never claim that Bang can  
5 reverse intellectual disability and help cure diseases such as Alzheimer's,  
6 Parkinson's, Huntington's and other forms of dementia. Bang is infinitely safer and  
7 healthier than Monster – consumption of Monster is associated with 17 deaths,  
8 heart attack, heartbeat irregularities and countless adverse event reports."

10 **SPECIAL INTERROGATORY NO. 6:**

11 Explain what the letters and numbers on the bottom of each BANG can refer  
12 to, including by identifying the information necessary to confirm date of  
13 production, location of production, production facility, and/or expiration date of  
14 the product indicated by each combination of letters and/or numbers. For  
15 reference, Exhibit A contains pictures of bottoms of a sample of BANG cans.

16 **RESPONSE TO INTERROGATORY NO. 6:**

17 Responding Party further objects to this Interrogatory on the basis that it  
18 seeks information that is confidential and proprietary in nature and is subject to the  
19 Protective Order. Specifically, this Interrogatory seeks trade secret information  
20 from a competitor pertaining to the reference to internal codes and production  
21 facilities and such information is not typically shared with competitors and may be  
22 used by Propounding Party to compete against Responding Party. Responding  
23 Party further objects to this Interrogatory as vague as to scope and time and  
24 seeking irrelevant information and documents. Responding Party further objects to  
25 this Interrogatory as unduly burdensome, harassing, and not proportional to the  
26 needs of this case under Rule 26(b)(1). Responding Party objects to this request as  
27 vague and ambiguous with respect to "each BANG can," "date of production," and  
28 "expiration date," as those terms are not defined or included on the bottom of a can

1 in the images in Exhibit A. Responding Party further objects to the extent other  
2 information necessary to respond to this Interrogatory is within the possession of  
3 Propounding Party but has not been produced, such as other information  
4 identifying the packaging of the can, and it is not clear from the four photographs  
5 in Exhibit A that the cans depicted are cans of Responding Party's BANG®  
6 product. To the extent the images on the bottom of the cans depicted in Exhibit A  
7 are not BANG® products, Responding Party objects to this Interrogatory as  
8 misleading, irrelevant, seeking information from third-parties, and/or calling for  
9 speculation. Responding Party will respond with respect to the examples provided  
10 in Exhibit A to the Interrogatories to the best of Responding Party's knowledge  
11 based on information and belief.

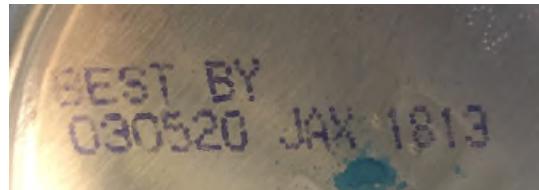
12 Subject to the foregoing general and specific objections, Responding Party  
13 responds as follows:

14 The following is an explanation of the information included on the bottom of  
15 the BANG® cans depicted in the images in Exhibit A. Generally, the phrase "best  
16 by" refers to the date by which the beverage will be of best flavor or quality. This  
17 "best by" phrase is followed by a six-digit numerical code specifying the month,  
18 day, and year, by which the beverage is "best by." This six-digit numerical code  
19 (for the "best by" date) is followed by a two- or three-digit internal abbreviation  
20 for the location (or site "ID") where the beverage was co-packed. Finally, this  
21 location or site ID is followed by a four-digit numerical code specifying when, in  
22 military time, the beverage was co-packed. Otherwise, the information necessary  
23 to confirm the date of production is contained within the "best by" date; the  
24 information necessary to confirm the location of production is contained within the  
25 site ID; and, the information necessary to confirm the production facility also is  
26 contained within the site ID.

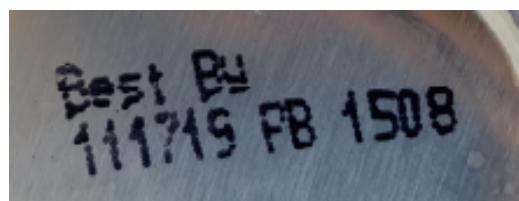
27 For example:

28

1           • With respect to the information on the bottom of the can depicted in  
2           the first image in Exhibit A (copied below), the “best by” date is  
3           March 5, 2020; the beverage was co-packed at a facility located in  
4           Jacksonville, FL, at 6:13 PM.



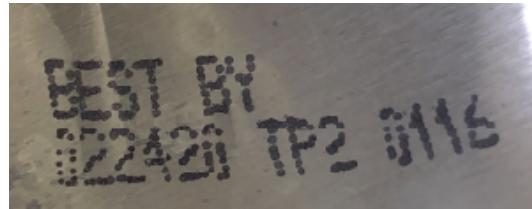
9           • With respect to the information on the bottom of the can depicted in  
10          the second image in Exhibit A (shown below), the “best by” date is  
11          November 17, 2019; the beverage was co-packed at a facility located  
12          in Portland, OR, at 3:08 PM.



18           • With respect to the information on the bottom of the can depicted in  
19           the third image in Exhibit A (shown below), the “best by” date is  
20           March 18, 2020; the beverage was co-packed at a facility located in  
21           Sikeston, MO at 7:52 AM



26           • With respect to the information on the bottom of the can depicted in  
27           the fourth image in Exhibit A (shown below), the “best by” date is



**SUPPLEMENTAL RESPONSE TO SPECIAL INTERROGATORY NO. 6:**

VPX maintains the foregoing and previously asserted general and special objections and supplements its response in light of meet and confer efforts to resolve the discovery dispute between the parties, as follows:

VPX has provided information above to sufficiently respond to this Interrogatory. During meet and confer correspondence related to the these interrogatories, Monster stated that it needed co-packer information because it was relevant to the formula for BANG. In light of the disclosure in this lawsuit of the amount of creatyl-l-leucine in BANG and the amount of caffeine, and based on the importance of maintaining trade secret information from a competitor which would now only be used for non-litigation, competitive purposes or to harrass, VPX objects to the production of further information regarding all of VPX's co-packers. VPX contends that this is proprietary trade secret information which VPX contends Monster has no reason to seek this information other than for competitive reasons outside this litigation. Based on information disclosed during meet and confer correspondence, it is not necessary for Monster to have this information regarding co-packers. Monster apparently seeks this information regarding co-packers or relevant dates in order to confirm testing of creatyl-l-leucine or to seek further information specifically regarding VPX's formulas for BANG, as alleged in the First Amended Complaint. Since VPX has disclosed the quantity of creatyl-l-leucine in meet and confer correspondence in this lawsuit, there is no reason for

1      Monster to seek further information from or harass VPX's co-packers, other than  
2      for competitive reasons. To disclose the information regarding co-packers would  
3      necessarily put VPX at a competitive disadvantage and provide a competitive  
4      advantage to Monster completely separate from this lawsuit specifically because  
5      those co-packers may have finite capacity and Monster may seek to disadvantage  
6      VPX by targeting those co-packers for Monster's competitive reasons. This  
7      information is not proportional to the needs of the case or necessary to disclose.

8           As stated above, the information regarding the co-packers is not relevant  
9      other than for purposes of Monster seeking information regarding the formula.  
10     Plaintiff moved to compel further response to Interrogatory No. 1, and VPX has  
11    agreed to disclose the quantity of that ingredient as well as caffeine. In order to  
12    resolve discovery disputes during the discovery process in this case, VPX has  
13    disclosed through meet and confer efforts that the quantity of creatyl-l-leucine in a  
14    can of BANG® ready to drink cans of BANG® energy drinks with the reference to  
15    SUPER CREATINE® is less than 40 mg and caffeine is 300 mg. VPX maintains  
16    that its formula and the quantity of creatyl-l-leucine is proprietary and a valuable  
17    trade secret which Monster seeks for competitive reasons because VPX's BANG  
18    product is so successful that Monster introduced an almost identical product called  
19    REIGN with almost identical packaging, formula, and branding, which specifically  
20    targets and is directed to VPX's customers. VPX discloses the amount of caffeine  
21    on the can label, which Monster recently copied in its knock-off REIGN product  
22    which also has 300 mg of caffeine. VPX maintains its objections to the formula  
23    being unnecessary as stated in VPX's motions and objections filed with the Court  
24    which objections are incorporated herein.

25     **SPECIAL INTERROGATORY NO. 7:**

26       If YOU contend that the Super Creatine contained in BANG has an effect on  
27    the VITALS and SUBSTANCES in the human body, identify all such effects and  
28    all DOCUMENTS that support YOUR contention.

1 **RESPONSE TO INTERROGATORY NO. 7:**

2        Responding Party objects to this Interrogatory on the basis that it seeks  
3 information that is confidential and proprietary in nature and is subject to the  
4 Protective Order. Responding Party further objects to this Interrogatory as vague  
5 as to scope and time and seeking irrelevant information and documents.  
6 Responding Party further objects to this Interrogatory as overbroad, vague, and  
7 ambiguous as to the terms “BANG” (as defined), “Super Creatine” (as it is not  
8 defined in this set of Interrogatories), “contend/contention,” “an effect/all such  
9 effects,” “VITALS,” and “SUBSTANCES,” as defined in this Interrogatory and  
10 the terms used in the definitions of VITALS and SUBSTANCES including the  
11 overbroad phrase “including” used in the definitions. Responding Party further  
12 objects to this Interrogatory as irrelevant, unduly burdensome, harassing, and not  
13 proportional to the needs of this case under Rule 26(b)(1). Propounding Party  
14 further objects to this Interrogatory to the extent it seeks information regarding  
15 documents and nonwritten files that may be within the scope of electronic requests  
16 for emails, and the Parties are meeting and conferring regarding document  
17 production, including custodians, search terms, and objections. Responding Party  
18 will not produce documents that are publicly available in response to this Request.  
19 Responding Party has no obligation to investigate and discover information and  
20 materials from third parties or sources that are equally accessible to Propounding  
21 Party such as, for example and without limitation, third party information  
22 regarding testing and studies. Responding Party further objects to this  
23 Interrogatory as seeking information that calls for expert opinion or a legal  
24 conclusion. To the extent information will be analyzed by an expert, such  
25 information may be provided in an expert’s report as set forth according to the  
26 Court’s schedule. Further, this Interrogatory appears to be duplicative of document  
27 requests, including specifically request No. 4, 36, and 37. Responding Party  
28 incorporates by reference all objections made in response to Request for

1 Documents, including but not limited to Nos. 4, 36, and 37.

2 Subject to the foregoing general and specific objections, Responding Party  
3 responds as follows:

4 Even though Responding Party is responding to this Interrogatory, to the  
5 extent this Interrogatory seeks relevant information, Responding Party does not  
6 have the burden of proof as to the topic raised in this Interrogatory. *See e.g.*, Order  
7 Denying Monster's Motion for a Preliminary Injunction, dated June 6, 2019, ECF  
8 122, page 6. For example, Propounding Party has the burden of demonstrating that  
9 Creatyl-L-Leucine or Creatyl-L-Glutamine do not provide the benefits of creatine.  
10 This Interrogatory appears to seek expert testimony, which is premature at this  
11 time and improper prior to the deadline for expert reports. Expert reports and  
12 testimony will be served according to the Federal Rules and the Court's schedule.  
13 Responding Party reserves the right to provide a rebuttal to Propounding Party's  
14 position after Propounding Party provides its position, evidence, expert reports,  
15 and/or testimony. While Responding Party is not aware of any previous contention  
16 that Responding Party has made in this litigation that SUPER CREATINE in  
17 BANG® has "an effect" on "VITALS" or "SUBSTANCES," as those terms are  
18 defined in this Interrogatory, and because any such contention in an expert report  
19 would be premature at this time, Responding Party explicitly reserves the right to  
20 make that contention in this case in the future. To the extent Propounding Party is  
21 referring to a specific contention that Propounding Party believes Responding  
22 Party has made about effects on VITALS or SUBSTANCES as those terms are  
23 defined, Responding Party objects to this Interrogatory as vague in scope and  
24 Responding Party seeks that information from Responding Party so that the scope  
25 of this Interrogatory can be clearly defined and Responding Party can respond to  
26 any specific contention(s) to which this Interrogatory is targeted. Responding  
27 Party incorporates by reference the declaration by Dr. Li in support of Defendants'  
28 Opposition to Monster's Motion for Preliminary Injunction, including Exhibit L3

1 (ECF 100 and exhibits 100-1 through 100-3) and documents referred to therein,  
2 including United States Patent No. 8,445,466. Exhibit L3 to Dr. Li's Declaration  
3 is a true and correct copy of the poster presentation for this latest study of BANG®.  
4 VPX sponsored a double-blind, placebo-controlled, crossover trial study of  
5 BANG®, performed by Nova Southeastern University, entitled "The Effects of  
6 BANG® Energy on Psychomotor Vigilance," by Christopher Horn, Madaline  
7 Kenyon, Cassandra Carson, Anya Ellerbrock, Lia Jiannine, Tobin Silver, Corey  
8 Peacock, Jaime Tartar, and Jose Antonio. In conclusion, the BANG® energy drink  
9 resulted in a significantly lower (i.e., faster) ( $p<0.05$ ) psychomotor vigilance mean  
10 reaction time versus the placebo as well as fewer lapses. Both Creatyl-L-leucine  
11 and Creatyl-L-glutamine in certain BANG® products have been branded under the  
12 trademark SUPER CREATINE.

13 This Interrogatory specifically seeks documents from third parties: "identify  
14 all such effects and all DOCUMENTS that support YOUR contention."  
15 Propounding Party will not produce "all" DOCUMENTS in response to this  
16 Interrogatory. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant  
17 reserves the right to produce business records in this action from which the answer  
18 to the reasonable scope of this Interrogatory may be ascertained. The answer to this  
19 Interrogatory may be determined by examining, auditing, compiling, abstracting,  
20 or summarizing Responding Party business records (including electronically stored  
21 information), and the burden of deriving or ascertaining the answer will be  
22 substantially the same for either party. Responding Party will meet and confer  
23 with Propounding Party to narrow the scope of this Request so that the non-  
24 privileged information in Responding Party's possession, custody, or control  
25 sufficient to respond to this Request is proportionate to the needs of this case and  
26 will be produced subject to a Protective Order. Specifically, Responding Party will  
27 continue to meet and confer with Propounding Party regarding ESI protocols,  
28 custodians, search terms, and date ranges.

1 **SUPPLEMENTAL RESPONSE TO SPECIAL INTERROGATORY NO. 7:**

2 VPX maintains the foregoing and previously asserted general and special  
3 objections and supplements its response in light of meet and confer efforts to  
4 resolve the discovery dispute between the parties, as follows:

5 The Parties have met and conferred as to email search terms and protocols  
6 and have agreed to review certain documents which appear targeted at this request  
7 and may be responsive to this Interrogatory, such as studies, etc. VPX is reviewing  
8 numerous documents and will supplement its rolling production and may  
9 supplement this Interrogatory if additional information is discovered. VPX  
10 maintains that Monster has the burden of proving all elements of each of the  
11 asserted causes of action. Monster has not done so. During meet and confer  
12 correspondence relating to this Interrogatory, while this Interrogatory does not seek  
13 information regarding *the quantity* of creatyl-l-leucine in BANG energy drinks,  
14 Monster claimed that the information regarding the quantity of creatyl-l-leucine  
15 and these interrogatories were relevant to claims 1-3 of the First Amended  
16 Complaint (FAC), which relate to claims of false advertising, specifically related to  
17 alleged statements made to consumers upon which those consumers would rely. In  
18 response to Paragraph 51 of the FAC, VPX responded that “Defendants admit  
19 Owoc has been asked on social media how much Super Creatine is in BANG® and  
20 that such is proprietary information.” Monster does not dispute that the BANG  
21 formula is a trade secret; in fact, Monster claims that its own formulas (e.g.,  
22 REIGN) are trade secrets and such disclosure would harm the owner of the formula  
23 if such information was in the hands of a competitor. Monster does not allege that  
24 VPX has ever disclosed the formula for BANG or that any consumer has ever  
25 relied on any statements from VPX relating to the formula or quantities of  
26 ingredients, other than 300 mg of caffeine, in BANG. VPX maintains that its  
27 formula and the quantity of creatyl-l-leucine is proprietary and a valuable trade  
28 secret which Monster seeks for competitive reasons because VPX’s BANG

1 product is so successful that Monster introduced an almost identical product called  
2 REIGN with almost identical packaging, formula, and branding, which specifically  
3 targets and is directed to VPX's customers. In order to resolve discovery disputes  
4 during the discovery process in this case, VPX has disclosed through meet and  
5 confer efforts that the quantity of creatyl-l-leucine in a can of BANG® ready to  
6 drink cans of BANG® energy drinks with the reference to SUPER CREATINE® is  
7 less than 40 mg and caffeine is 300 mg. VPX has not disclosed the quantities of  
8 the other ingredients in BANG. VPX has not previously disclosed the quantity of  
9 creatyl-l-leucine in advertising or on the labels of its cans of BANG®, nor has VPX  
10 ever stated that there were more than 40 mg of creatyl-l-leucine in BANG® ready  
11 to drink cans. No competitors of VPX sell an energy drink with more creatyl-l-  
12 leucine than BANG. No consumers seeking a specific quantity of creatine in any  
13 form have been told by VPX how much creatyl-l-leucine is in the proprietary blend  
14 of BANG. Thus, no consumers could reasonably rely on such statements in  
15 advertisements (as VPX has not made those statements). In addition, no false  
16 statements of fact were made about the quantities of ingredients or their impact on  
17 consumers for this product, no consumer could have relied on or did rely on such  
18 statements, no statements deceived consumers or were likely to deceive  
19 consumers, and no alleged "deception" (as Monster alleges) was or would be  
20 material to a consumer. Further, Monster could not have been harmed by any  
21 statements relating to creatyl-l-leucine related to the BANG energy drink. As set  
22 forth through Dr. Li's Declaration and the patent, to VPX's knowledge, VPX is the  
23 first to use creatyl-l-leucine in an energy drink. To date, VPX is not aware of any  
24 competitors who have sold an energy drink containing creatyl-l-leucine. Upon  
25 information and belief, Monster has never made and does not sell an energy drink  
26 with creatyl-l-leucine or other form of creatine, even creatine monohydrate. *See*  
27 Monster Response to Request for Admission ("RFA") Nos. 1-6 (RFA No. 1:  
28 "...Monster admits that it has never released an energy drink product with Monster

1 branding that contains creatine.”; RFA No. 2: “Monster admits that it has never  
2 released an energy drink product with Monster branding that contains creatyl-L-  
3 leucine.”

4       Creatine supplements come in many forms in the marketplace and such  
5 supplements have been scientifically proven to provide positive health effects,  
6 including building muscle and strength and boosting athletic performance, and  
7 research has also shown that creatine supplements have the potential for helping  
8 with age-related neurological diseases, such as improving brain function and  
9 boosting memory. Dr. Li cites to some studies in his Declaration, other studies are  
10 available publicly, and studies that are responsive to Monster’s proposed email  
11 search terms that are agreed upon by the parties will be reviewed and responsive,  
12 non-privileged documents will be produced. Further, there is no dispute that  
13 studies show that exercise, a healthy lifestyle, and low carbohydrate and low sugar  
14 diets can provide benefits (unlike many of Monster’s energy drinks) can provide  
15 health benefits and new articles and studies come out all the time. See, e.g., an  
16 article dated today, October 30, 2019, in the Wall Street Journal, titled “The Link  
17 Between Diet, Exercise and Alzheimer’s - A new study finds that lifestyle changes  
18 can improve cognition.” [https://www.wsj.com/articles/the-link-between-diet-](https://www.wsj.com/articles/the-link-between-diet-exercise-and-alzheimers-11572427802)  
19 [exercise-and-alzheimers-11572427802](https://www.wsj.com/articles/the-link-between-diet-exercise-and-alzheimers-11572427802). That article cites to a study released on  
20 October 30, 2019.

21       The creatyl-l-leucine in a 16 oz. can of a BANG® energy drink is not  
22 intended to be a sole source of creatine and does not advertise that it is, but rather  
23 is a great tasting drink to add to a well-balanced diet that includes the consumption  
24 of other foods containing creatine, such as beef, chicken, pork, eggs, and  
25 fish. Further, Bang as a complete product with zero sugars and zero calories is a  
26 healthier option than most energy drinks manufactured by its competitors,  
27 including Monster, which contain large quantities of sugar, carbohydrates, and  
28 other more harmful ingredients. And, in addition to creatyl-l-leucine (Super

1 Creatine), Bang contains many ingredients that have been characterized as  
2 providing positive health benefits, including caffeine, vitamins, electrolytes,  
3 CoQ10 and amino acids. In fact, as referenced above, a recent peer-reviewed  
4 double blind study of Bang RTD demonstrated that the BANG® energy drink  
5 resulted in a significantly lower (i.e., faster) ( $p<0.05$ ) psychomotor vigilance mean  
6 reaction time versus the placebo as well as fewer lapses.

7 VPX is not aware of any contentions VPX has made in this case or publicly  
8 about the quantity of the creatyl-l-leucine (Super Creatine) in a 16 oz. can of a  
9 BANG® energy drink or that the quantity of the creatyl-l-leucine (Super Creatine)  
10 in a 16-oz can has “an effect on the VITALS and SUBSTANCES in the human  
11 body” as phrased in this Interrogatory, as those terms are defined or understood by  
12 VPX, or provides specific health benefits except as compared to other energy  
13 drinks offered by competitors. In fact, Monster introduced a similar product called  
14 REIGN in order to compete with VPX in a category of drinks third parties call the  
15 performance energy category. *See e.g.*, Monster’s Motion for a Preliminary  
16 Injunction Exhibit C and D to Emilie Tirre’s Declaration in support of Monster’s  
17 Motion, ECF 67-6. Below is an excerpt from Exhibit C, page 24 of 27, showing  
18 Reign’s description of ingredients mirroring BANG’s description.

Reign	
All Natural Flavors	Yes
Zero Calories	Yes
Zero Sugar	Yes
No Artificial Colors	Yes
300 MG Caffeine	Yes
Electrolytes	Yes
BCAA's	Yes
CO Q10	Yes

26 Further in Exhibit D to Tirre’s Declaration, Monster cites to a report from  
27 Guggenheim which claims that “Monster has one of the most attractive long-term  
28 growth algorithms in our Food and Beverage coverage as we expect organic sales

1 and EPS CAGR of 10% and 14%, respectively. The sustainable growth outlook is  
2 supported by ... 3) innovation in energy-adjacent segments such as coffee and  
3 “performance energy” with REIGN...”

4       Monster’s counsel stated during meet and confer correspondence that certain  
5 paragraphs of the First Amended Complaint were the basis of Monster’s  
6 Interrogatories Nos. 4, 7, and 8, specifically paragraphs 46 to 48 of the First  
7 Amended Complaint (“FAC”). Paragraphs 46-48 of the FAC, however, do not  
8 provide any context for where those statements come from, none of these alleged  
9 statements are full quotes, and Monster provided no citations to where these  
10 statements were made. As such, it does not appear from the quoted language or the  
11 descriptions made by Monster in Paragraphs 46 to 48 that these statements are  
12 about any specific health effects of creatyl-l-leucine in a can of BANG ready to  
13 drink energy drinks or related to the quantity of creatyl-l-leucine in a can. Monster  
14 does not allege that these statements were made in public, to consumers, or in  
15 advertisements. The fact that those statements are not in quotes indicates that the  
16 statements are taken out of context and that none of them are about Super Creatine  
17 when considered in context. Further, as stated in the prior objections, there is no  
18 evidence from Monster or its experts that any of these statements are false. VPX  
19 has already addressed and denied many of these statements in a post on its website:  
20 <https://bang-energy.com/blog/ca-based-monster-energy-file-third-frivolous-lawsuit-against-vpx/>, including the following statement by Jack Owoc addressing  
21 numerous false allegations in Monster’s Complaint: “I never claim that Bang can  
22 reverse intellectual disability and help cure diseases such as Alzheimer’s,  
23 Parkinson’s, Huntington’s and other forms of dementia. Bang is infinitely safer and  
24 healthier than Monster – consumption of Monster is associated with 17 deaths,  
25 heart attack, heartbeat irregularities and countless adverse event reports.”

27 **SPECIAL INTERROGATORY NO. 8:**

28       If YOU contend that the Super Creatine contained in BANG increases the

1 circulating levels of creatine or creatinine in the human body, identify all bases  
2 supporting YOUR contention, including the approximate amount of the alleged  
3 increases.

4 **RESPONSE TO INTERROGATORY NO. 8:**

5 Responding Party objects to this Interrogatory on the basis that it seeks  
6 information that is confidential and proprietary in nature and is subject to the  
7 Protective Order. Responding Party further objects to this Interrogatory as vague  
8 as to scope and time and seeking irrelevant information and documents.  
9 Responding Party further objects to this Interrogatory as vague and ambiguous as  
10 to the terms “BANG” (as defined), “Super Creatine” (as it is not defined in this set  
11 of Interrogatories), “contend/contention,” “increases the circulating levels,”  
12 “creatine,” and “alleged increases.” Responding Party further objects to this  
13 Interrogatory as irrelevant, unduly burdensome, harassing, and not proportional to  
14 the needs of this case under Rule 26(b)(1). Propounding Party further objects to  
15 this Interrogatory to the extent it seeks information regarding documents and  
16 nonwritten files that may be within the scope of electronic requests for emails, and  
17 the Parties are meeting and conferring regarding document production, including  
18 custodians, search terms, and objections. Responding Party will not produce  
19 documents that are publicly available in response to this Request. Responding  
20 Party has no obligation to investigate and discover information and materials from  
21 third parties or sources that are equally accessible to Propounding Party such as,  
22 for example and without limitation, third party information regarding testing and  
23 studies. Responding Party further objects to this Interrogatory as seeking  
24 information that calls for expert opinion or a legal conclusion. To the extent  
25 information will be analyzed by an expert, such information may be provided in an  
26 expert’s report as set forth according to the Court’s schedule. Further, this  
27 Interrogatory appears to be duplicative of document requests, including  
28 specifically request No. 4. Responding Party incorporates by reference all

1 objections made in response to Request for Documents, including but not limited  
2 to Nos. 4, 36, and 37.

3 Subject to the foregoing general and specific objections, Responding Party  
4 responds as follows:

5 Even though Responding Party is responding to this Interrogatory, to the  
6 extent this Interrogatory seeks relevant information, Responding Party does not  
7 have the burden of proof as to the topic raised in this Interrogatory. *See e.g.*, Order  
8 Denying Monster's Motion for a Preliminary Injunction, dated June 6, 2019, ECF  
9 122, page 6. For example, Propounding Party has the burden of demonstrating that  
10 Creatyl-L-Leucine or Creatyl-L-Glutamine do not provide the benefits of creatine.  
11 This Interrogatory appears to seek expert testimony, which is premature at this  
12 time and improper prior to the deadline for expert reports. Expert reports and  
13 testimony will be served according to the Federal Rules and the Court's schedule.  
14 Responding Party reserves the right to provide a rebuttal to Propounding Party's  
15 position after Propounding Party provides its position, evidence, expert reports,  
16 and/or testimony. While Responding Party is not aware of any previous contention  
17 that Responding Party has made in this litigation that SUPER CREATINE in  
18 BANG® “increases the circulating levels of creatine or creatinine in the human  
19 body” by any “alleged increase” as those terms are used in this Interrogatory, and  
20 because any such contention in an expert report would be premature at this time,  
21 Responding Party explicitly reserves the right to make that contention in this case  
22 in the future. To the extent Propounding Party is referring to a specific contention  
23 that Propounding Party believes Responding Party has made about SUPER  
24 CREATINE increasing “the circulating levels of creatine or creatinine in the  
25 human body,” Responding Party objects to this Interrogatory as vague in scope and  
26 Responding Party seeks that information from Responding Party so that the scope  
27 of this Interrogatory can be clearly defined and Responding Party can respond to  
28 any specific contention(s) to which this Interrogatory is targeted. Responding

1 Party incorporates by reference the declaration by Dr. Li in support of Defendants'  
2 Opposition to Monster's Motion for Preliminary Injunction, including Exhibit L3  
3 (ECF 100 and exhibits 100-1 through 100-3) and documents referred to therein,  
4 including United States Patent No. 8,445,466. Exhibit L3 to Dr. Li's Declaration  
5 is a true and correct copy of the poster presentation for this latest study of BANG®.  
6 VPX sponsored a double-blind, placebo-controlled, crossover trial study of  
7 BANG®, performed by Nova Southeastern University, entitled "The Effects of  
8 BANG® Energy on Psychomotor Vigilance," by Christopher Horn, Madaline  
9 Kenyon, Cassandra Carson, Anya Ellerbrock, Lia Jiannine, Tobin Silver, Corey  
10 Peacock, Jaime Tartar, and Jose Antonio. In conclusion, the BANG® energy drink  
11 resulted in a significantly lower (i.e., faster) ( $p<0.05$ ) psychomotor vigilance mean  
12 reaction time versus the placebo as well as fewer lapses. Both Creatyl-L-leucine  
13 and Creatyl-L-glutamine in certain BANG® products have been branded under the  
14 trademark SUPER CREATINE.

15 This Interrogatory specifically seeks documents from third parties: "identify  
16 all bases supporting YOUR contention." Propounding Party will not produce "all"  
17 DOCUMENTS that provide any bases or support for any contention(s) in response  
18 to this Interrogatory. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant  
19 reserves the right to produce business records in this action from which the answer  
20 to the reasonable scope of this Interrogatory may be ascertained. The answer to this  
21 Interrogatory may be determined by examining, auditing, compiling, abstracting,  
22 or summarizing Responding Party business records (including electronically stored  
23 information), and the burden of deriving or ascertaining the answer will be  
24 substantially the same for either party. Responding Party will meet and confer  
25 with Propounding Party to narrow the scope of this Request so that the non-  
26 privileged information in Responding Party's possession, custody, or control  
27 sufficient to respond to this Request is proportionate to the needs of this case and  
28 will be produced subject to a Protective Order. Specifically, Responding Party will

1 continue to meet and confer with Propounding Party regarding ESI protocols,  
2 custodians, search terms, and date ranges.

3 **SUPPLEMENTAL RESPONSE TO SPECIAL INTERROGATORY NO. 8:**

4 VPX maintains the foregoing and previously asserted general and special  
5 objections and supplements its response in light of meet and confer efforts to  
6 resolve the discovery dispute between the parties, as follows:

7 The Parties have met and conferred as to email search terms and protocols  
8 and have agreed to review certain documents which appear targeted at this request  
9 and may be responsive to this Interrogatory, such as studies, etc. VPX is reviewing  
10 numerous documents and will supplement its rolling production and may  
11 supplement this Interrogatory if additional information is discovered. VPX  
12 maintains that Monster has the burden of proving all elements of each of the  
13 asserted causes of action. Monster has not done so. During meet and confer  
14 correspondence relating to this Interrogatory, while this Interrogatory does not seek  
15 information regarding *the quantity* of creatyl-l-leucine in BANG energy drinks,  
16 Monster claimed that the information regarding the quantity of creatyl-l-leucine  
17 and these interrogatories were relevant to claims 1-3 of the First Amended  
18 Complaint (FAC), which relate to claims of false advertising, specifically related to  
19 alleged statements made to consumers upon which those consumers would rely. In  
20 response to Paragraph 51 of the FAC, VPX responded that “Defendants admit  
21 Owoc has been asked on social media how much Super Creatine is in BANG® and  
22 that such is proprietary information.” Monster does not dispute that the BANG  
23 formula is a trade secret; in fact, Monster claims that its own formulas (e.g.,  
24 REIGN) are trade secrets and such disclosure would harm the owner of the formula  
25 if such information was in the hands of a competitor. Monster does not allege that  
26 VPX has ever disclosed the formula for BANG or that any consumer has ever  
27 relied on any statements from VPX relating to the formula or quantities of  
28 ingredients, other than 300 mg of caffeine, in BANG. VPX maintains that its

1 formula and the quantity of creatyl-l-leucine is proprietary and a valuable trade  
2 secret which Monster seeks for competitive reasons because VPX's BANG  
3 product is so successful that Monster introduced an almost identical product called  
4 REIGN with almost identical packaging, formula, and branding, which specifically  
5 targets and is directed to VPX's customers. In order to resolve discovery disputes  
6 during the discovery process in this case, VPX has disclosed through meet and  
7 confer efforts that the quantity of creatyl-l-leucine in a can of BANG® ready to  
8 drink cans of BANG® energy drinks with the reference to SUPER CREATINE® is  
9 less than 40 mg and caffeine is 300 mg. VPX has not disclosed the quantities of  
10 the other ingredients in BANG. VPX has not previously disclosed the quantity of  
11 creatyl-l-leucine in advertising or on the labels of its cans of BANG®, nor has VPX  
12 ever stated that there were more than 40 mg of creatyl-l-leucine in BANG® ready  
13 to drink cans. No competitors of VPX sell an energy drink with more creatyl-l-  
14 leucine than BANG. No consumers seeking a specific quantity of creatine in any  
15 form have been told by VPX how much creatyl-l-leucine is in the proprietary blend  
16 of BANG. Thus, no consumers could reasonably rely on such statements in  
17 advertisements (as VPX has not made those statements). In addition, no false  
18 statements of fact were made about the quantities of ingredients or their impact on  
19 consumers for this product, no consumer could have relied on or did rely on such  
20 statements, no statements deceived consumers or were likely to deceive  
21 consumers, and no alleged "deception" (as Monster alleges) was or would be  
22 material to a consumer. Further, Monster could not have been harmed by any  
23 statements relating to creatyl-l-leucine related to the BANG energy drink. As set  
24 forth through Dr. Li's Declaration and the patent, to VPX's knowledge, VPX is the  
25 first to use creatyl-l-leucine in an energy drink. To date, VPX is not aware of any  
26 competitors who have sold an energy drink containing creatyl-l-leucine. Upon  
27 information and belief, Monster has never made and does not sell an energy drink  
28 with creatyl-l-leucine or other form of creatine, even creatine monohydrate. *See*

1      Monster Response to Request for Admission (“RFA”) Nos. 1-6 (RFA No. 1:  
2      “...Monster admits that it has never released an energy drink product with Monster  
3      branding that contains creatine.”; RFA No. 2: “Monster admits that it has never  
4      released an energy drink product with Monster branding that contains creatyl-L-  
5      leucine.”

6              Creatine supplements come in many forms in the marketplace and such  
7      supplements have been scientifically proven to provide positive health effects,  
8      including building muscle and strength and boosting athletic performance, and  
9      research has also shown that creatine supplements have the potential for helping  
10     with age-related neurological diseases, such as improving brain function and  
11     boosting memory. Dr. Li cites to some studies in his Declaration, other studies are  
12     available publicly, and studies that are responsive to Monster’s proposed email  
13     search terms that are agreed upon by the parties will be reviewed and responsive,  
14     non-privileged documents will be produced. Further, there is no dispute that  
15     studies show that exercise, a healthy lifestyle, and low carbohydrate and low sugar  
16     diets can provide benefits (unlike many of Monster’s energy drinks) can provide  
17     health benefits and new articles and studies come out all the time. See, e.g., an  
18     article dated today, October 30, 2019, in the Wall Street Journal, titled “The Link  
19     Between Diet, Exercise and Alzheimer’s - A new study finds that lifestyle changes  
20     can improve cognition.” <https://www.wsj.com/articles/the-link-between-diet-exercise-and-alzheimers-11572427802>. That article cites to a study released on  
21     October 30, 2019.

23              The creatyl-l-leucine in a 16 oz. can of a BANG® energy drink is not  
24     intended to be a sole source of creatine and does not advertise that it is, but rather  
25     is a great tasting drink to add to a well-balanced diet that includes the consumption  
26     of other foods containing creatine, such as beef, chicken, pork, eggs, and  
27     fish. Further, Bang as a complete product with zero sugars and zero calories is a  
28     healthier option than most energy drinks manufactured by its competitors,

1 including Monster, which contain large quantities of sugar, carbohydrates, and  
2 other more harmful ingredients. And, in addition to creatyl-l-leucine (Super  
3 Creatine), Bang contains many ingredients that have been characterized as  
4 providing positive health benefits, including caffeine, vitamins, electrolytes,  
5 CoQ10 and amino acids. In fact, as referenced above, a recent peer-reviewed  
6 double blind study of Bang RTD demonstrated that the BANG® energy drink  
7 resulted in a significantly lower (i.e., faster) ( $p<0.05$ ) psychomotor vigilance mean  
8 reaction time versus the placebo as well as fewer lapses.

9 VPX is not aware of any contentions VPX has made in this case or publicly  
10 about the quantity of the creatyl-l-leucine (Super Creatine) in a 16 oz. can of a  
11 BANG® energy drink or that the quantity of the creatyl-l-leucine (Super Creatine)  
12 in a 16-oz can “increases the circulating levels of creatine or creatinine in the  
13 human body” as phrased in this Interrogatory, or have specific health benefits  
14 except as compared to other energy drinks offered by competitors. In fact,  
15 Monster introduced a similar product called REIGN in order to compete with VPX  
16 in a category of drinks third parties call the performance energy category. *See e.g.*,  
17 Monster’s Motion for a Preliminary Injunction Exhibit C and D to Emilie Tirre’s  
18 Declaration in support of Monster’s Motion, ECF 67-6. Below is an excerpt from  
19 Exhibit C, page 24 of 27, showing Reign’s description of ingredients mirroring  
20 BANG’s description.

Reign	
All Natural Flavors	Yes
Zero Calories	Yes
Zero Sugar	Yes
No Artificial Colors	Yes
300 MG Caffeine	Yes
Electrolytes	Yes
BCAA's	Yes
CO Q10	Yes

28 Further in Exhibit D to Tirre’s Declaration, Monster cites to a report from

1 Guggenheim which claims that “Monster has one of the most attractive long-term  
2 growth algorithms in our Food and Beverage coverage as we expect organic sales  
3 and EPS CAGR of 10% and 14%, respectively. The sustainable growth outlook is  
4 supported by ... 3) innovation in energy-adjacent segments such as coffee and  
5 “performance energy” with REIGN...”

6       Monster’s counsel stated during meet and confer correspondence that certain  
7 paragraphs of the First Amended Complaint were the basis of Monster’s  
8 Interrogatories Nos. 4, 7, and 8, specifically paragraphs 46 to 48 of the First  
9 Amended Complaint (“FAC”). Paragraphs 46-48 of the FAC, however, do not  
10 provide any context for where those statements come from, none of these alleged  
11 statements are full quotes, and Monster provided no citations to where these  
12 statements were made. As such, it does not appear from the quoted language or the  
13 descriptions made by Monster in Paragraphs 46 to 48 that these statements are  
14 about any specific health effects of creatyl-l-leucine in a can of BANG ready to  
15 drink energy drinks or related to the quantity of creatyl-l-leucine in a can. Monster  
16 does not allege that these statements were made in public, to consumers, or in  
17 advertisements. The fact that those statements are not in quotes indicates that the  
18 statements are taken out of context and that none of them are about Super Creatine  
19 when considered in context. Further, as stated in the prior objections, there is no  
20 evidence from Monster or its experts that any of these statements are false. VPX  
21 has already addressed and denied many of these statements in a post on its website:  
22 <https://bang-energy.com/blog/ca-based-monster-energy-file-third-frivolous-lawsuit-against-vpx/>, including the following statement by Jack Owoc addressing  
23 numerous false allegations in Monster’s Complaint: “I never claim that Bang can  
24 reverse intellectual disability and help cure diseases such as Alzheimer’s,  
25 Parkinson’s, Huntington’s and other forms of dementia. Bang is infinitely safer and  
26 healthier than Monster – consumption of Monster is associated with 17 deaths,  
27 heart attack, heartbeat irregularities and countless adverse event reports.”

1  
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3  
4 Dated: October 31, 2019  
5  
6

**GORDON REES SCULLY  
MANSUKHANI, LLP**

7 By: /s/ Timothy K. Branson  
8 M. D. Scully  
9 Timothy K. Branson  
10 Sean P. Flynn  
11 Holly L.K. Heffner  
12 Michael D. Kanach  
13 Attorneys for Defendants  
14 Vital Pharmaceuticals, Inc., dba  
15 VPX Sports and John H. Owoc  
16 aka Jack Owoc  
17  
18  
19  
20  
21  
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23  
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26  
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28

Gordon Rees Scully Mansukhani, LLP  
101 West Broadway, Suite 2000  
San Diego, CA 92101

## **CERTIFICATE OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, 275 Battery Street, Suite 2000, San Francisco, CA 94111, my electronic mail address is mkanach@grsm.com. On October 31, 2019, I served the foregoing document(s) entitled: **DEFENDANT VITAL PHARMACEUTICALS, INC., D/B/A VPX SPORTS' RESPONSE TO PLAINTIFF MONSTER ENERGY COMPANY'S SPECIAL INTERROGATORIES, SET TWO** as follows:

- BY ELECTRONIC MAIL** by transmitting via electronic mail the document(s) listed above to the address(es) listed below on this date pursuant to FRCP 5(b)(2)(E).

**Counsel for Plaintiff MONSTER  
ENERGY:**

John C. Hueston  
Moez Kaba  
Steven N. Feldman  
Joseph A. Reiter  
Michael H. Todisco  
Sourabh Mishra  
Hueston Hennigan LLP  
523 West 6<sup>th</sup> Street, Suite 400  
Los Angeles, CA 90014  
Phone: 213-788-4340

jhueston@hueston.com  
mkaba@hueston.com  
sfeldman@hueston.com  
jreiter@hueston.com  
mtodisco@hueston.com  
smishra@hueston.com

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on October 31, 2019 at San Mateo, California.

/s/ Michael D. Kanach  
Michael D. Kanach

## VERIFICATION

2 STATE OF CALIFORNIA )  
3 CENTRAL DISTRICT )

5 I, Marc Kesten, declare:

I am the Corporate Secretary of **VITAL PHARMACEUTICALS, INC.**,  
**D/B/A VPX SPORTS**, a corporation organized and existing under the laws of  
California, which is the Defendant in the above-entitled action, and I have been  
authorized to make this verification on its behalf.

10 I have read the foregoing **DEFENDANT VITAL PHARMACEUTICALS,**  
11 **INC., D/B/A VPX SPORTS' SUPPLEMENTAL RESPONSE TO PLAINTIFF**  
12 **MONSTER ENERGY COMPANY'S SPECIAL INTERROGATORIES,**  
13 **SETS ONE AND TWO** on file herein and know the contents thereof. To the  
14 extent I have personal knowledge of the matters set forth therein, the same are true  
15 and correct. Insofar as said matters are a composite of the information of many  
16 individuals, I do not have personal knowledge concerning all of the information  
17 contained in said Response, but I am informed and believe that the information set  
18 forth therein for which I lack personal knowledge is true and correct.

19 I declare under penalty of perjury under the laws of the State of California  
20 that the foregoing is true and correct.

21 || Executed at Dallas, Texas, on October 30, 2019.



Marc J. Kesten